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No. 86-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HIROTOSHI YAMAMOTO,

Petitioner,

v.

CHARLES R. KLENSKE,
Trustee in Reorganization, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT STATE OF HAWAII IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the *pro se* Petitioner has standing to litigate the issues presented by the Petition for Certiorari?

2. Whether the claim that the Act of June 3, 1985, ch. 187, 1985 Hawaii Sess. L. 316, violates the Constitution, raised by a petition for rehearing in the Court of Appeals in February, 1986, in appeal No. 84-2807 (9th Cir. decided Feb. 4, 1986) ("*Manoa Finance II*"), was properly rejected below on procedural grounds, particularly given that:

   (a) the litigation below, *i.e.*, *Manoa Finance II*, involved an adversary proceeding brought to determine Petitioner's obligations as a *debtor* of Manoa Finance Company, Inc.;

   (b) when the petition for rehearing in *Manoa Finance II* was filed, the Court of Appeals, in *Manoa Finance I*, No. 85-2692 (9th Cir. Dec. 30, 1985), had just affirmed an October 2, 1985, decision rejecting Petitioner's claims as a putative *owner* of Manoa Finance Company, Inc.; and

   (c) Petitioner's instant federal claims, which seek to relitigate his claims as an asserted owner rejected by *Manoa Finance I*, both could have and should have been presented to the lower courts in that earlier litigation?

3. Whether, assuming this Court may review the merits of Petitioner's claims, any substantial federal question is presented by the District Court's liquidation of Manoa Finance Company, Inc., pursuant to a plan in which public funds made available by Hawaii

law subsidized the interests of particular classes of creditors to which Petitioner did not belong?*

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* Petitioner, Hirotoshi Yamamoto, is an individual named as a defendant in the adversary proceeding filed in the United States Bankruptcy Court for the District of Hawaii, *sub nom. Klenske v. Yamamoto*, No. 83-0222 (D. Hawaii filed Dec. 16, 1983), from which the instant petition arises. Also named in the District Court were George W.H. Goo, Robert S. Teramoto, Masayuki Tokioka, Shizuko Yamamoto, Sakae Takahashi, Elizabeth Takahashi, Makaha Laundry, Inc., Makaha Reef, Inc., Takahashi-Yamamoto Joint Ventures, SSK Investments, Inc., and Asian American Medical Clinic of San Francisco. The partial summary judgment entered in the District Court on November 14, 1984, involved only Counts VIII and XVII of the Complaint in No. 83-0222, in which Yamamoto was the sole defendant. Pursuant to the Clerk's order dated December 2, 1986, the State of Hawaii, which did not appear below, is a respondent pursuant to 28 U.S.C. § 2403(b) (1982). Charles R. Klenske, Trustee in the Chapter 11 case in the District Court from which arose the adversary action at issue on this petition, is also a respondent here.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
A. The Regulatory Background.	6
B. Events Leading to Liquidation of Manoa Finance Company, Inc.	8
1. The Chapter 11 Proceedings Leading to *Manoa Finance I.*	8
2. Manoa Finance Company's Massive Liabilities.	9
3. The State of Hawaii's Infusion of Funds to Subsidize Depositor Interests.	10
4. The Plan of Reorganization and the Liquidation Order Affirmed in *Manoa Finance I.*	12
C. The Adversary Proceedings Below Leading to *Manoa Finance II.*	15
REASONS FOR DENYING THE WRIT	16
I. Petitioner Lacks Standing to Interject the Claimed Federal Defenses to His Liability to the Estate.	17
II. Petitioner's Substantive Claims are Otherwise Barred by the Reorganization Plan Litigation.	19

III. Even if the Liquidation Order Could Be Reviewed, Petitioner's Points of Error are Insubstantial. 22

CONCLUSION 25

TABLE OF AUTHORITIES

CASES:	Page
Anderson v. Bessemer City, 470 U.S. 564 (1984)	24
Bender v. Williamsport Area School District, 106 S. Ct. 1326 (1986)	14 n.8, 17-18
Connolly v. Pension Benefit Guaranty Corp., 106 S. Ct. 1018 (1986)	22-23
Dandridge v. Williams, 397 U.S. 471 (1970)	24
Delta Airlines, Inc. v. August, 450 U.S. 346 (1981)	18
Durfee v. Duke, 375 U.S. 106 (1963)	19
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	20
Fidelity Federal Savings & Loan Association v. De La Cuesta, 458 U.S. 141 (1982)	23
Foman v. Davis, 371 U.S. 178 (1962)	21
Hoover v. Ronwin, 466 U.S. 558 (1984)	18
In re Manoa Finance Co., Inc., Bankr. No. 83-65 (D. Hawaii Bankr. Oct. 2, 1985), *aff'd*, No. 85-2692 (9th Cir. Dec. 30, 1985) ("*Manoa Finance I*")	*passim*
In re Manoa Finance Co., Inc., No. 83-222 (D. Hawaii Nov. 14, 1984), *aff'd*, 781 F.2d 1370 (9th Cir. Feb. 4, 1986) ("*Manoa Finance II*"), *petition for cert. filed*, No. 86-558 (U.S. Sept. 22, 1986)	*passim*
In re Chicago, Milwaukee, St. Paul and Pacific Railroad Co., 799 F.2d 317 (7th Cir. 1986)	20
Kelly v. Robinson, 107 S. Ct. 353 (1986)	23 n.12
Kremer v. Chemical Construction Co., 456 U.S. 461 (1982)	19
Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984)	20-21
McDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986)	20,25
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940)	18

Table of Authorities continued

	Page
Nevada v. United States, 463 U.S. 110 (1983)	20
Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)	18
Ohio Civil Rights Comm'n v. Dayton Christian Schools, 106 S. Ct. 2718 (1986)	19
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)	20
Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)	23
Reed v. Allen, 286 U.S. 191 (1932)	21
State Farm Insurance Co. v. Duel, 324 U.S. 154 (1945)	21
Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Association, 455 U.S. 691 (1982) .	19
United States v. Security Industrial Bank, 459 U.S. 70 (1982)	25
Williamson v. Lee Optical Co., 348 U.S. 483 (1955)	24
CONSTITUTIONAL PROVISIONS:	
United States Constitution, Article I, § 8, cl. 4 ...	3
United States Constitution, Article III, § 2, cl. 2	3
United States Constitution, Article VI	3
United States Constitution, Fifth Amendment	4
United States Constitution, Fourteenth Amendment	4
STATUTES:	
11 U.S.C. § 507(a) (1982 & Supp. III 1985)	12
11 U.S.C. ch. 11 (1982 & Supp. III 1985)	8,21

Table of Authorities continued

Page

11 U.S.C. § 1123(a)(5)(D) (1982 & Supp. III 1985) 13,25 n.13

11 U.S.C. § 1129(a)(11) (1982) 13,25 n.13

11 U.S.C. § 1129(b)(2) (1982 & Supp. III 1985) 13 n.7,25 n.13

28 U.S.C. § 1254(1) (1982) 2

28 U.S.C. § 1291 (1982) 3,16

28 U.S.C. § 1334 (1982) 3,15

28 U.S.C. § 2101(c) (1982) 3,19

28 U.S.C. § 2403(b) (1982) ..... ii n.*

Act of April 27, 1931, ch. 148, 1931 Hawaii Sess. L. 144-46, *as amended and codified*, Hawaii Rev. Stat. ch. 401 (1985) 4,6 n.2,7 n.3

Act of May 17, 1937, ch. 230, 1937 Hawaii Sess. L. 90, *as amended and codified*, Hawaii Rev. Stat. § 401-12 (1985) 7

The Hawaii Industrial Loan and Investment Act of 1937 and amendments

Act of May 17, 1937, ch. 231, 1937 Hawaii Sess. L. 202-18, *as amended and codified*, Hawaii Rev. Stat. ch. 408 (1985) 4

Hawaii Rev. Stat. § 408-14(a)(6) (1985) 6 n.1

Act of May 23, 1972, ch. 113, § 1, 1972 Hawaii Sess. L. 421-22, *as amended and codified*, Hawaii Rev. Stat. § 408-14(c) (1985) 7 n.3

Act of May 5, 1977, ch. 28, § 1, 1977 Hawaii Sess. L. 36, *as amended and codified*, Hawaii Rev. Stat. § 408-13 (1985) 7 n.3

Act of May 16, 1979, ch. 71, § 2, 1979 Hawaii Sess. L. 145-46, *as amended and codified*, Hawaii Rev. Stat. § 408-14(d) (1985) 7 n.3

The Hawaii Industrial Loan Company Guaranty Act of 1977 and amendments

Table of Authorities continued

	Page
Act of April 1, 1977, ch. 2, 1977 Hawaii Sess. L. 3-15, *as amended and codified*, Hawaii Rev. Stat. ch. 408A (1985)	4,7,22
Hawaii Rev. Stat. § 408A-4 (1985)	7
Hawaii Rev. Stat. § 408A-10 (1985)	7
Hawaii Rev. Stat. § 408A-14(a) (1985)	8
Hawaii Rev. Stat. § 408A-14(c) (1985)	8,23
Act of June 8, 1983, ch. 233, § 2, 1983 Hawaii Sess. L. 483, *codified*, Hawaii Rev. Stat. § 408A-4 (1985)	12 n.4
Act of June 3, 1985, ch. 187, 1985 Hawaii Sess. L. 316-20 ("Act 187"), *codified in part*, Hawaii Rev. Stat. ch. 408A (1985)	i,4,11-13,15-16,19,21,24
Act 187, § 5	11
Act 187, § 5(1)(A)	11
Act 187, § 5(2)	11
Act 187, § 5(3)	11
Act 187, § 5(4)	11
Act 187, § 6	12 n.4
Act 187, § 7	11
Hawaii Rev. Stat. § 415-50 (1985)	17
COURT RULES:	
U.S. Sup. Ct. R. 17	17
Fed. R. Civ. P. 54(b)	15
Bankruptcy Rule 7013 (1983)	22 n.11
Bankruptcy Rule 7024 (1983)	18
Bankruptcy Rule 7054(a) (1983)	15
LEGISLATIVE HISTORY:	
Act of May 29, 1925, ch. 268, § 3, 1925 Hawaii Sess. L. 383	6 n.2
Hawaii Sen. Stand. Comm. Rep. No. 225-85, *reprinted in* 1985 Hawaii Sen. J. 991	10

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BRIEF OF RESPONDENT STATE OF HAWAII IN OPPOSITION

Respondent State of Hawaii respectfully prays that this Court deny the Petition for Certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 4, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 781 F.2d 1370 (9th Cir. 1986) [hereinafter "*Manoa Finance II*"], and is reprinted at Petitioner's Appen-

dix [hereinafter "Pet. App."] B. The unpublished order of the Court of Appeals denying Petitioner's petition for rehearing and rejecting Petitioner's suggestion for rehearing *en banc* is reprinted at Pet. App. C. The District Court's November 14, 1984 order, from which appeal was taken to the Court of Appeals, appears at Pet. App. A.

Other opinions and orders related to the petition include the District Court's Findings of Fact and Conclusions of Law entered upon confirmation of the Trustee's Chapter 11 plan of reorganization in *In re Manoa Finance Company, Inc.*, Bankr. No. 83-65 (D. Hawaii Bankr. filed Oct. 2, 1985), which are reprinted at Appendix ["App."] A, *infra;* the District Court's Order confirming the plan, *id.* (filed Oct. 2, 1985), which is reprinted at Pet. App. J; and the order of the Court of Appeals dismissing the appeal from the District Court's October 2, 1985, order, No. 85-2692 (9th Cir. Dec. 30, 1985) (*"Manoa Finance I"*), which is reprinted at App. E, *infra.*

JURISDICTION

The judgment of the Court of Appeals in *Manoa Finance II* was entered on February 4, 1986. A petition for rehearing and suggestion of the appropriateness of rehearing *en banc* were denied on June 24, 1986, and the Petition for Certiorari was filed on September 22, 1986. Although jurisdiction in this Court appears to have been invoked under 28 U.S.C. § 1254(1) (1982), the State of Hawaii respectfully suggests that Petitioner may lack standing as a result of the judgment of the Court of Appeals in *Manoa Finance I*, entered on December 30, 1985, of which this Court has no jurisdiction to give direct appellate

review. Jurisdiction, however, properly lay under 28 U.S.C. § 1334 (1982) for the District Court to enter its order of November 14, 1984, granting the Trustee's adversary claim. The Court of Appeals determined it had authority to hear an appeal from that order under 28 U.S.C. § 1291 (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Because of the posture of the federal questions presented here for review, the most pertinent constitutional provision is Article III, section 2, clause 2 of the Constitution of the United States, which provides in relevant part that

> In all . . . Cases [but those affecting ambassadors, other public ministers, and those in which a state shall be a party,] the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The most relevant statutory provision is section 2101(c) of Title 28, United States Code, which provides in part that

> [A]ny writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be . . . applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Federal constitutional and statutory provisions less directly involved include the Bankruptcy, Supremacy,

and Just Compensation Clauses, as well as the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and relevant provisions of Title 11, United States Code, which are reprinted at App. I, *infra*. The statutory authority of the Bank Examiner of Hawaii (now known as the Commissioner of Financial Institutions), established by the Act of April 27, 1931, ch. 148, § 2, 1931 Hawaii Sess. L. 144, *as amended and codified,* Hawaii Rev. Stat. ch. 401 (1985), and the Hawaii Industrial Loan and Investment Act, Act of May 17, 1937, ch. 231, 1937 Hawaii Sess. L. 202-18, *as amended and codified,* Hawaii Rev. Stat. ch. 408 (1985), which extends the Bank Examiner's power to industrial loan companies, are reprinted in relevant part at App. J, *infra*. The Hawaii Industrial Loan Company Guaranty Act, Act of April 1, 1977, ch. 2, 1977 Hawaii Sess. L. 3, *codified,* Hawaii Rev. Stat. ch. 408A (Supp. 1977), and the 1983 amendments thereto, Act of July 1, 1983, ch. 233, 1983 Hawaii Sess. L. 481, *codified,* Hawaii Rev. Stat. ch. 408A (Supp. 1983), *recodified at* Hawaii Rev. Stat. ch. 408A (1985), are reprinted in relevant part at App. K, *infra*. The Act of June 3, 1985, ch. 187, 1985 Hawaii Sess. L. 316, *codified in part,* Hawaii Rev. Stat. ch. 408A (1985), which amends the Industrial Loan Company Guaranty Act, is reprinted at Pet. App. H.

STATEMENT OF THE CASE

The instant Petition represents a final chapter in Hirotoshi Yamamoto's legacy of mismanagement at Manoa Finance Company, Inc. ("MFC"), which operated as an industrial loan company in Hawaii from 1960 until its liquidation under a reorganization plan

confirmed by the District Court on October 2, 1985. MFC's self-inflicted demise was precipitated by its violations of state-law capitalization rules enacted in 1972 to protect the investing public from unsound industrial loan practices. In 1983, under his power to redress those violations, the Hawaii Bank Examiner caused MFC to be placed into receivership. The receiver, Thrift Guaranty Corporation of Hawaii, began paying off MFC's depositors, and, pursuant to its 1977 authorizing legislation, took over the depositors' claims against MFC. Meanwhile, Yamamoto sought Chapter 11 protection for MFC in the United States District Court.

When the dust settled, the District Court found that MFC's debts so exceeded its assets that its stock was worthless, and that a plan of reorganization liquidating MFC was proper. In *Manoa Finance I,* the Ninth Circuit affirmed the liquidation order, holding that Yamamoto lacked standing to contest the liquidation order in his personal capacity. Although the time to obtain this Court's review of that ruling or the liquidation order itself has expired, Yamamoto now seeks such review via an appeal in a routine contract matter in which the Chapter 11 Trustee claimed, and Yamamoto admitted, that Yamamoto in his personal capacity owed MFC in excess of $1.6 million on the basis of personal promissory notes. The target of Yamamoto's belated claims, a public spending measure passed by the Hawaii legislature to facilitate the liquidation plan, did not displace anyone's vested rights or bankruptcy entitlements. Rather, that law simply fostered the Thrift Guaranty Corporation's purchase of depositor claims against MFC, and assumption of the risk of prosecuting those claims in Chapter 11.

A. The Regulatory Background.

Since Hawaii's earliest days as a Territory, the Hawaii legislature has responded to the reality that those who take in deposits and make loans do not always conduct their business in a safe, responsible manner. At the time MFC was placed into receivership, this response provided two lines of protection for depositors[1] investing in industrial loan companies such as MFC, and, by the same token, left regulatory and financial burdens squarely upon the equity shareholders in such concerns.

First, Hawaii legislated standards of care that industrial loan companies were required to observe on pain of dissolution. Before 1937, industrial loan companies were subject to sanction only if, for example, the Bank Examiner could show that a company's continued operation "would be hazardous to the public."[2] In the Industrial Loan and Investment Act, the Legislature imposed objective capitalization, diversification, debt/equity, and liquid reserve requirements, *see* Act of May 17, 1937, ch. 231, 1937 Hawaii Sess. L. at 207, 209, 211, 212. In the period leading to MFC's collapse, Hawaii's legislated conditions for continued

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[1] Hawaii industrial loan companies are not empowered to take in deposits due on demand, but only to issue certificates for the payment of money. *See* Act of May 17, 1937, ch. 231, § 1, 1937 Hawaii Sess. L. at 208, *codified at* Hawaii Rev. Stat. § 408-14(6) (1985). For sake of simplicity, amounts paid for such certificates will nevertheless be referred to as deposits and those holding such certificates will be referred to as depositors.

[2] Act of May 29, 1925, ch. 268, § 3, 1925 Hawaii Sess. L. 383, 384. *See also* Act of April 27, 1931, ch. 148, § 2, 1931 Hawaii Sess. L. 144, 144-45 (authorizing Bank Examiner to issue desist orders and take control of noncomplying companies), *as amended and codified,* Hawaii Rev. Stat. § 401-5 (1985).

operation of an industrial loan concern included, among others, a maximum ten-to-one ratio of debt to equity.[3] An industrial loan company's failure to maintain an adequate capital base authorized the Hawaii Bank Examiner to place the company into receivership. Act of May 17, 1937, ch. 230, § 6, 1937 Hawaii Sess. L. 90, 93, *as amended and codified,* Hawaii Rev. Stat. § 401-12 (1985).

Second, as a consequence of the failure of several large industrial loan concerns in the mid-1970s, and the massive loss of "consumer confidence in this industry," the Legislature in 1977 enacted the Hawaii Industrial Loan Company Guaranty Act ("HILCGA"). *See* Act of April 2, 1977, ch. 2, § 1, 1977 Hawaii Sess. L. 3-4. As enacted, HILCGA required industrial loan companies, as a condition of continued operation, to become members of the Thrift Guaranty Corporation of Hawaii ("TGCH"). Hawaii Rev. Stat. § 408A-4 (1985). TGCH, in turn, was required by law to create a pool of liquid reserves, subsidized first by a loan of $20 million from the State of Hawaii, but ultimately paid by assessments on member institutions. *Id.* § 408A-10; ch. 2, § 4, 1977 Hawaii Sess. L. 13-14. If a member company were adjudicated bankrupt or placed in receivership, HILCGA author-

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[3] Act of May 23, 1972, ch. 113, § 1, 1972 Hawaii Sess. L. 421, 422, *as amended and codified,* Hawaii Rev. Stat. § 408-14(c) (1985); *see also* Act of May 16, 1979, ch. 71, § 2, 1979 Hawaii Sess. L. 145-46 (mandated seven percent liquid reserve), *codified at* Hawaii Rev. Stat. § 408-14(d) (1985); Act of May 5, 1977, ch. 28, § 1, 1977 Hawaii Sess. L. 36 ($300,000 capitalization level), *codified at* Hawaii Rev. Stat. § 408-13 (1985); Act of April 27, 1931, ch. 148, 1931 Hawaii Sess. L. 144 (requirement of "safe" and "authorized" operation), *codified at* Hawaii Rev. Stat. § 401-5 (1985).

ized the Bank Examiner to direct TGCH forthwith to pay each depositor up to $10,000 from the liquidity pool. *Id.* § 408A-14(a). As enacted, however, the law clearly stated that

> Whenever the guaranty corporation makes payments [to a thrift account holder], it shall be subrogated to all rights of the thrift account holder up to the amount of its payment, and shall be entitled to repayment in full from the estate of the member prior to any distribution to the thrift account holder to whom it has made payment.

1977 Hawaii Sess. L. at 10, *codified at* Hawaii Rev. Stat. § 408A-14(c) (1985). Thus, HILCGA simply required TGCH, to the extent its liquidity pool permitted, to purchase and prosecute depositors' claims against any industrial loan corporation in receivership or bankruptcy. Shareholders in any failed industrial loan company would be neither better off, nor worse off than in the absence of HILCGA's scheme of protection.

B. Events Leading to Liquidation of Manoa Finance Company, Inc.

1. The Chapter 11 Proceedings Leading to *Manoa Finance I.*

MFC was incorporated as an industrial loan company in 1960, and, by 1970, had apparently accumulated assets in excess of $26 million. *See* Pet. App. I-11. Its shares were owned by Manoa Enterprise, Inc., Pet. App. F2-2, and Hirotoshi Yamamoto, the Petitioner here, served as MFC's director, Pet. App. F1-2, and manager, Pet. App. I-11. By the early 1980s, MFC generated large losses, exceeding $8 million in 1983 alone. *Id.* Because MFC had exceeded

the debt/equity ratio allowed by Hawaii law, and violated other state-law rules, the Hawaii Bank Examiner in February, 1983 caused MFC to be placed into receivership. Pet. at 2. The State of Hawaii Circuit Court appointed TGCH receiver and TGCH began to make payments to depositors under HILCGA, thereby taking on depositors' claims against MFC. Pet. App. I-12, I-13; Hawaii Rev. Stat. § 408A-14(c) (1985). On February 10, 1983, MFC filed in the United States Bankruptcy Court for the District of Hawaii under Chapter 11 of the Bankruptcy Act of 1978, as amended, 11 U.S.C. §§ 1101-74 (1982). *See* Pet. App. F. In July, 1983, the Bankruptcy Court appointed Respondent Charles E. Klenske as Trustee. Pet. App. I-12.

2. Manoa Finance Company's Massive Liabilities.

Although MFC submitted balance sheets to the Bankruptcy Court claiming net capital in excess of $4.3 million, as the Trustee reported to MFC's creditors in December, 1983, those statements failed properly to account for inter-company loans amongst MFC and its subsidiaries, and overestimated the value of receivables in violation of accepted accounting principles. *See* Pet. App. G-2. Consequently, a more accurate picture MFC's capital account at the beginning of the Chapter 11 case, prepared by the certified public accounting firm of Alexander Grant & Company, showed negative equity in excess of $16.8 million. *See id.;* Pet. App. I-12. As the Chapter 11 proceeding progressed, the Trustee sold substantial portions of MFC's real estate and other property. Pet. App. I-12. Nonetheless, as late as June 1985, the Trustee reported that MFC's liabilities still exceeded the book value of its assets by at least $10.3 million.

See id. Even this proof that MFC was bankrupt failed to recognize that many of MFC's assets were, "in the Trustee's opinion, uncollectable." *See id.* At most, MFC's cash and assets totalled $30.8 million. *Id.* at I-9, I-14. By June 1985, depositor claims alone, about $45 million at the start of the Chapter 11 case, remained at $29.9 million, with TGCH and others holding claims of $14.1 million. *Id.* at I-12, I-13.

3. The State of Hawaii's Infusion of Funds to Subsidize Depositor Interests.

MFC's demand for federal protection thus placed tremendous strains on TGCH's ability to discharge its function of paying depositor claims in exchange for the depositors' rights under Chapter 11. *See* Pet. App. G-2. HILCGA was originally structured to raise only about $9 million from assessments on TGCH member institutions, *see* 1977 Hawaii Sess. L. at 3, 9, and, even in the event of exhaustion of the liquidity pool, TGCH was authorized to make emergency assessments that would likely raise only about $5 million annually. *Id.* Although the reduction in depositor claims from $45 to $29 million was in large part a consequence of TGCH's payment of $12.6 million under an "advance payment" program, Pet. App. I-13, by February 1985 the Hawaii Senate Committee on Consumer Protection found that TGCH "has ceased to function effectively and has no current funds to provide immediate redress to the aggrieved depositors." Hawaii Sen. Stand. Comm. Rep. No. 225-85, *reprinted in* 1985 Hawaii Sen. J. 991.

To facilitate immediate relief to depositors without committing the State itself to purchase depositors' claims, the Hawaii Legislature authorized additional loans of up to $9.5 million of public funds to TGCH

on the condition that such funds would be used to pay depositor claims against MFC. Act of June 3, 1985, ch. 187, § 5, 1985 Hawaii Sess. L. 316, 317 ("Act 187"), Pet. App. H-3. Act 187 also conditioned use of public funds on the Bankruptcy Court's confirmation, by June, 1986, of a Chapter 11 plan that returned to MFC's depositors within 90 days of confirmation any amounts they would have otherwise received from TGCH had MFC's collapse not already drained the liquidity pool. *Id.* §§ 5(1)(A), 5(2)-(3).

To further protect the fisc, the Legislature imposed, as an added condition on TGCH's receipt of additional loans, the requirement that TGCH's property, including any received from MFC in consequence of a reorganization plan, must serve as collateral for Act 187 loans. Act 187, § 5(4), Pet. App. H-4. Act 187 further prevented TGCH from impairing the value of that collateral by makiing sales of TGCH property subject to approval by the Hawaii Bank Examiner. *Id.* Act 187 also reaffirmed TGCH's continuing obligations to the State on loans made to TGCH from 1977 to 1983 pursuant to HILCGA's original authorizing legislation. *Id.* § 7, Pet. App. H-7.

Thus, none of the relief to depositors afforded by Act 187 came at the expense of MFC's equity shareholders. Rather, relief was contingent on TGCH's duty to finance the difference between Act 187 funds and remaining depositor claims, a sum of about $20 million. Only if TGCH could assemble such financing, and persuade the Bankruptcy Court to adopt a plan satisfying Act 187 and the Bankruptcy Act, would funds be released. *Id.* § 5, Pet. App. H-3.[4] Far from

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[4] Because 1983 amendments to HILCGA required industrial

interfering with any vested right, or any rule of bankruptcy law, Act 187 simply facilitated a routine substitution of one large creditor, TGCH, for the thousands of individuals whose hard-earned savings had been frozen because of MFC's demand for Chapter 11 relief.

4. The Plan of Reorganization and the Liquidation Order Affirmed in *Manoa Finance I.*

On August 27, 1985, MFC's Chapter 11 Trustee filed a proposed plan of reorganization complying with Act 187, whereby $8 million in Act 187 funds lent to TGCH, and $19.5 million raised by TGCH's member institutions, would be exchanged with the estate for MFC's assets, then valued at $27.5 million. Pet. App. I-10, I-13, I-14. The purchase funds would then be combined with $3.3 million from MFC's cash reserves, and about $1.05 million from other sources, and used to pay superpriority claims allowed under 11 U.S.C. § 507(a), and, under TGCH supervision, MFC's depositors. *See* Pet. App. I-8, I-9. Secured creditors would not be paid in cash, but rather would be left to their state-law remedies. *Id.* Other claims against MFC, including TGCH's $12.6 million claim arising out of its purchase of depositor claims to date,

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loan companies to secure liquidity protection from the Federal Deposit Insurance Corporation no later than June 30, 1984, if depositors' claims accruing as of the switchover date were bought by TGCH pursuant to Act 187, or otherwise extinguished, TGCH's role in providing liquidity protection would be fully discharged. *See* Act of June 8, 1983, ch. 233, § 2, 1983 Hawaii Sess. L. 481, 483, *codified,* Hawaii Rev. Stat. § 408A-4 (1985). The Legislature provided that upon confirmation of a Chapter 11 plan for MFC, TGCH's power to exact payments for the liquidity pool would be terminated. Act 187, § 6, Pet. App. H-6.

would be *waived* if MFC's equity shareholders took nothing under the plan and MFC's stock were cancelled. *Id.* at I-8, I-9, I-12. Thus, although MFC was liquidated and deprived of a "right" to realize unrealistic, speculative future gains on its assets, the likely losers under the plan were TGCH, and the State of Hawaii, which bore the risk that MFC's assets might never suffice to repay TGCH's Act 187 or other borrowings necessitated by MFC's collapse.

Although Yamamoto disclaimed on his petition for Chapter 11 relief having even an indirect interest in MFC, Pet. App. F2-2, he appeared, *pro se,* in the Bankruptcy Court in Honolulu to contest the proposed plan, claiming that his rights as a shareholder in Manoa Enterprise, Inc., which owned MFC's common stock, were prejudiced by the Trustee's refusal to value MFC as a going concern.[5] The Trustee thus objected to Yamamoto's standing to object.[6] The Trustee also claimed Yamamoto's contention that MFC should be evaluated as a going concern was ill-founded because MFC was properly subject to liquidation under 11 U.S.C. §§ 1123(a)(5)(D) and 1129(a)(11), and that, because no lower class of creditors would receive anything, the plan complied with the "fair and equitable" standard for nonconsensual reorganization plans.[7] The District Court overruled

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[5] Objections to Trustee's Plan of Reorganization, *In re Manoa Finance Co.*, Bankr. No. 83-65 (D. Hawaii Bankr. filed Sept. 23, 1985), *reprinted at* Respondent Klenske's Appendix D.

[6] Confirmation Trial Brief 16, *id.* (D. Hawaii Bankr. filed Sept. 23, 1985); Tr. at 5-6, *id.* (filed Sept. 30, 1985).

[7] 11 U.S.C. § 1129(b)(2); *see* Response of Charles R. Klenske, Chapter 11 Trustee, to Objection of Hirotoshi Yamamoto to Con-

Yamamoto's objection and confirmed the plan on October 2, 1985. *See* Pet. App. J-1, J-4. After Yamamoto appealed, the United States Court of Appeals for the Ninth Circuit summarily affirmed the District Court's liquidation order and dismissed Yamamoto's appeal for want of standing. *In re Manoa Finance Company,* No. 85-2692 (9th Cir. Dec. 30, 1985) ("*Manoa Finance I*"), App. E, *infra.*[8] No petition for rehearing was filed, and the time to seek this Court's review of

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firmation of Chapter 11 Plan of Reorganization at 2-4, *In re Manoa Finance Co.*, Bankr. No. 83-65 (D. Hawaii Bankr. filed Sept. 30, 1985).

[8] Prior to the Ninth Circuit's decision in *Manoa Finance I,* the Trustee, on behalf of the estate, and Yamamoto, *pro se,* stipulated to a dismissal of the appeal if Yamamoto could bring "other actions or proceedings against other parties related to or involved with Manoa Finance Company, Inc." App. C. The Clerk of the Court of Appeals entered a dismissal in No. 85-2692 on December 17, 1985, App. D. Apparently as a consequence, the lower court's docket sheet does not reflect entry of *Manoa Finance I.* For the following reasons, we believe that this situation is likely explained as an administrative error, and, that, even if the decision in *Manoa Finance I* were void, the parties' rights would be unaffected.

First, the Ninth Circuit, particularly during the time in which it would be timely to file a motion to vacate the clerk's December 17, 1985, order, was entitled to protect its jurisdiction by entering its December 30, 1985, order, which denied Yamamoto's claimed right, implicitly granted by the clerk's dismissal, to limit the collateral consequences of the District Court's confirmation order. *See Bender v. Williamsport Area School District,* 106 S. Ct. 1326, 1331 (1985). Second, even if *Manoa Finance I* were a nullity, Petitioner is left no better off for purposes here by his stipulation to dismiss. That stipulation allowed "other actions or proceedings against *other parties,*" App. C (emphasis added). Petitioner did not preserve *any* claim, such as a shareholder claim, against MFC's estate.

Manoa Finance I by writ of certiorari expired March 30, 1986.

C. The Adversary Proceedings Below Leading to *Manoa Finace II.*

Before Act 187 was passed, and the reorganization plan confirmed, the Trustee commenced an adversary proceeding in the District Court under 28 U.S.C. § 1334 (1982) to collect on numerous claims, including claims that Yamamoto had failed to pay about $1.1 million due to MFC on personal notes executed between 1968 and 1977. Complaint ¶¶ 75, 79, 131, 133, *Klenske v. Yamamoto,* No. 83-222 (D. Hawaii filed Dec. 16, 1983), App. F. The Trustee moved for partial summary judgment on the contract claims and the District Court granted the motion on November 14, 1984, and certified the judgment pursuant to Rule 54(b), Fed. R. Civ. P., and Bankruptcy Rule 7054(a). Pet. App. A-1, A-5. At the time judgment was entered, the amount due, including interest, totalled $1.67 million. *Id.* at A-3. At no time in the District Court did Yamamoto assert as a counterclaim or basis for set-off his once-removed equity interest in MFC.[9]

Yamamoto appealed, and the Court of Appeals, after the case was submitted on November 19, 1985, affirmed on February 4, 1986, more than a month after *Manoa Finance I. In re Manoa Finance Company,* 781 F.2d 1370 (9th Cir. 1986) (per curiam) ("*Manoa Finance II*"), Pet. App. B. The Court of

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[9] Answer to Complaint, *In re Manoa Finance Co.*, No. 83-222 (D. Hawaii filed Jan. 18, 1984), App. G, *infra. See* Bankr. R. 7013 ("[A] party sued by a trustee . . . [may, but] need not state as a counterclaim any claim which he has against the debtor, his property, or the estate . . . .").

Appeals first held that it had jurisdiction under 28 U.S.C. § 1291 (1982), and then rejected Yamamoto's contention that the District Judge should have recused himself for lack of impartiality. 781 F.2d at 1372-73, Pet. App. B-2—B-5. The court then affirmed the Trustee's partial summary judgment on the merits. *Id.* at 1374, Pet. App. B-6. In a petition for rehearing Yamamoto reasserted the claim made in MFC's Chapter 11 petition that in fact MFC had net positive equity in excess of $4 million, and alleged, as in *Manoa Finance I,* that Act 187, by enabling TGCH to take over MFC's assets by extinguishing depositor claims, violated the Due Process Clause and impermissibly "interfere[d] with the proceedings in the bankruptcy court." Petition for Rehearing at 2-3, No. 84-2807 (9th Cir. filed Feb. 20, 1986), App. H, *infra; cf.* Notice of Appeal, Bankr. No. 83-65 (D. Hawaii Bankr. filed Oct. 11, 1985), App. B, *infra.* On June 24, 1986, the Court of Appeals denied rehearing. Pet. App. C.

REASONS FOR DENYING THE WRIT

Act 187, the focus of Petitioner's claims in this Court, is plainly the sort of legitimate State spending measure that would be routinely upheld under this Court's precedents. But even if Act 187, or the underlying Chapter 11 proceedings that triggered its operation, presented any substantial federal questions, this case, which concerns Petitioner's debts to MFC, is not a permissible avenue for litigating those issues. Whether the adversary proceeding below might ever have been a proper forum to raise a federal challenge to Act 187, under long-established rules of claim and issue preclusion, *Manoa Finance I* clearly bars the

interposition of Petitioner's putative federal defenses to the collection of debts he admits are due and owing. Far from establishing any of the predicates for review under this Court's Rule 17, the instant Petition advocates positions squarely foreclosed by well-settled policies and precedents. Accordingly, the Petition should be denied.

I. The Petitioner Lacks Standing to Interject the Claimed Federal Defenses to His Liability to the Estate.

A.

Fairly stated, Yamamoto's claim is that his $1.67 million debt to MFC should be reduced by some asserted amount equal to what he claims was the true value of MFC's shareholder equity after all liabilities had been accounted for. *See* Petition at 2-3, 6. But, as he admits, *id.* at 2, Yamamoto never held equity interests in MFC. Those interests, when MFC existed, were held by Manoa Enterprise, Inc., which was not named and did not intervene in the adversary proceedings below, and has not appeared in this Court through duly appointed counsel. *See id.* Thus, Yamamoto's claim rests on the suggestion that, as a *pro se* litigant, he is entitled to pursue the claims of Manoa Enterprise, Inc., because he is Manoa Enterprise's sole shareholder and chief officer. *See* Pet. at 2; Pet. App. E9-2.

Even if Yamamoto were authorized to represent Manoa Enterprise, Inc., in his official capacity, *see* Hawaii Rev. Stat. § 415-50 (1985), and even if that would suffice to give rise to a case or controversy if Manoa Enterprise were a party below, *see Bender v. Williamsport Area School District,* 106 S. Ct. 1326,

1333 & n.7 (1986), the basis for Yamamoto's presence in his official capacity is lacking because Yamamoto never so appeared in the courts below. To paraphrase *Bender*, because the judgment against Yamamoto was not in his official capacity, "he has no standing to appeal in that capacity." 106 S. Ct. at 1332. Yamamoto might have moved in the Bankruptcy Court under Bankruptcy Rule 7024 to allow Manoa Enterprise to intervene; even after *Manoa Finance II,* Yamamoto might have suggested on rehearing below that the District Court's judgment should be vacated and remanded to give Manoa Enterprise leave to enter and claim against the Trustee. But he never did so, and that failure may not be lightly excused even though this case arises from the inferior federal courts. *See Hoover v. Ronwin,* 466 U.S. 558, 574 n.25 (1984); *Delta Airlines, Inc. v. August,* 450 U.S. 346, 362 (1981); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434 (1940); *cf. Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 255-56 (1981). Because there is no party here with standing to assert the claims of MFC's equity shareholders, the Court has no jurisdiction to hear such claims.

B.

The Article III defects burdening the instant Petition are even more salient given that the very question of Petitioner's standing to litigate the rights of Manoa Enterprise, Inc., against MFC's estate were resolved against Yamamoto in *Manoa Finance I* before the Court of Appeals decided *Manoa Finance II.* The Ninth Circuit's unappealed, summary order stated explicitly that Yamamoto "has no standing to appeal the district court's order approving the plan of re-

organization." *Manoa Finance I,* No. 85-2692 (9th Cir. Dec. 30, 1985), App. E, *infra.*

It is well settled that jurisdictional issues resolved by a binding judgment are entitled to the same preclusive effect as any other matters decided in litigation. *See Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Association,* 455 U.S. 691, 706, 714 (1982) (quoting *Durfee v. Duke,* 375 U.S. 106, 111 (1963)). And, because Yamamoto had a full opportunity to have *Manoa Finance I* overturned on rehearing, on rehearing *en banc,* or on direct review to this Court, there is no valid basis for redeciding the issue of Yamamoto's standing here. *See Kremer v. Chemical Construction Co.*, 456 U.S. 461, 484 (1982) (judicial review as satisfying due process concerns); *cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools,* 106 S. Ct. 2718, 2724 (1986) (same). *See also supra* n.6 (notice of standing defects in the District Court). Given the time limits on this Court's appellate jurisdiction imposed by 28 U.S.C. § 2101, *Manoa Finance I* jurisdictionally bars review here. *Manoa Finance I* held that Yamamoto lacked standing to assert an attack on Act 187's effects, or on the reorganization plan generally, and, accordingly, he has no standing to do so now.

II. Petitioner's Substantive Claims are Otherwise Barred by the Reorganization Plan Litigation.

Even if this Court were not bound at all by Article III constraints, the Ninth Circuit's affirmation of the District Court's liquidation order in *Manoa Finance I* still precludes the instant federal challenges to the judgment below in *Manoa Finance II.* First, by leaving the District Court's confirmation order intact,

Manoa Finance I conclusively establishes that by June, 1985: (1) "the present market value of MFC's assets (aside from cash) [wa]s [only] approximately $27.5 million"; (2) even on a book value basis, MFC's liabilities exceeded assets by "approximately 10.3 million"; and, hence, (3) "[e]ven if the Trustee were able to realize the fair market values of MFC's assets, there would be insufficient funds available to return any amount [to] MFC's shareholders." Pet. App. I-12, I-13, I-14.

Under established issue preclusion principles, these facts are not subject to relitigation here. *See Nevada v. United States,* 463 U.S. 110, 130 n.11 (1983) (quoting *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979)). Because a violation of the Just Compensation Clause may be found only if "reasonable investment-backed expectations" have been defeated, *see McDonald, Sommer & Frates v. Yolo, County,* 106 S. Ct. 2561, 2566 (1986), the federal court judgment in *Manoa Finance I* thus negates any claim that Act 187 or the reorganization plan deprived MFC's equity shareholders of "their just due." Pet. at 6. *See also In re Chicago, Milwaukee, St. Paul and Pacific Railroad Co.,* 799 F.2d 317 (7th Cir. 1986) (Easterbrook, J.). Moreover, because the doctrine of claim preclusion bars "the parties or their privies from relitigating issues that were or could have been raised in [a prior] action[,]" *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981), any claim that Act 187 is preempted by federal bankruptcy law, Pet. at 5-6, is likewise foreclosed. Because any attack on Act 187 or the reorganization plan could have been interposed in the confirmation proceeding that led to *Manoa Finance I,* those claims are barred even if the Bankruptcy Court's decision was incorrect. *Moitie,* 452 U.S.

at 398; *cf. Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362 (1984) ("manifest error" exception to rules of preclusion); *State Farm Insurance Co. v. Duel,* 324 U.S. 154, 162 (1945) (same).

That Act 187 was not enacted until 1985, whereas summary judgment on Yamamoto's notes was entered in 1984, does not affect the foregoing analysis. First, it is dubious whether Yamamoto justifiably failed to raise his indirect equity interest in MFC as a ground for offset in the adversary action because Act 187 was not yet law. But even if he did, the issue on rehearing below was whether the judgment should be vacated and the case remanded with leave, presumably given to Manoa Enterprise, Inc., to plead such an interest. The lower court correctly decided this issue because, in light of *Manoa Finance I*'s binding effects, amendment would be futile. *See Foman v. Davis,* 371 U.S. 178, 182 (1962). In sum, this case is identical to *Reed v. Allen,* 286 U.S. 191 (1932). As in *Reed,* had Yamamoto timely sought review in *Manoa Finance I*, this Court, "having both cases before it, might have afforded a remedy. . . . But this course [petitioner] neglected to follow." 286 U.S. at 198, *quoted, Moitie,* 452 U.S. at 400.[10]

A procedural bar here is especially warranted given that the proceeding Yamamoto would have this Court nullify is one for Chapter 11 reorganization. The entire purpose of Chapter 11, indeed all of bankruptcy law, is to reduce, as far as possible, a multitude of

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[10] Petitioner suggested below that the claims here were preserved by his stipulation in the appeal leading to *Manoa Finance I. See* Petition for Rehearing at 4, No. 84-2807 (9th Cir. filed Feb. 14, 1986), App. H, *infra.* This contention is without merit for the reasons stated in note 8, *supra.*

lawsuits against the estate to one comprehensive case.[11] Nothing would be more destructive of the purposes of the Bankruptcy Act than allowing claimants like Yamamoto, who had a full opportunity to raise challenges to a reorganization plan, to relitigate those issues in the guise of counterclaims designed to frustrate efforts to collect on debts admitted to be due and owing to the estate (and its successors).

III. Even if the Liquidation Order Could be Reviewed, Petitioner's Points of Error are Insubstantial.

Even if the reorganization case could be resuscitated, Yamamoto's points of error do not warrant review. Although Petitioner's precise contention is difficult to fathom, it appears to be his assumption that, as a result of enactment of HILGCA in 1977, MFC had no real duty to its depositors when it was shut down for violating state-law capitalization rules. It thus seems to be Yamamoto's belief that TGCH was solely responsible for paying depositor claims upon default, for, only if that were the case could MFC have been "a $21 million company seeking refuge under Chapter 11." Pet. at 3.

Although the State of Hawaii would submit that a measure that forced a financial institution to reassume obligations to depositors that had been assumed *in toto* by a system of deposit insurance would survive scrutiny in light of *Connolly v. Pension Benefit Guaranty Corporation,* 106 S. Ct. 1018 (1986), the Court is not faced with a legislated shifting of private rights that is even close to a measure that "completely de-

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[11] Bankruptcy Rule 7013, for example, encourages debtors of the estate, such as Yamamoto, to litigate what would otherwise be compulsory counterclaims in the Chapter 11 proceeding.

prive[d]" MFC "of whatever amount of money it [was] obligated to pay to fulfill its [contractual] liability." *Id.* at 1026 (upholding statute despite such effects). Contrary to Petitioner's suggestion, HILCGA never extinguished industrial loan company liability. Rather, it simply set up a means whereby, if an industrial loan concern were forced into receivership or bankruptcy, depositors would be paid by TGCH, and TGCH would take on depositors' claims against the illiquid company. Under HILCGA, whenever TGCH made payments to depositors, it became "subrogated to all rights of the thrift account holder up to the amount of its payment[.]" 1977 Hawaii Sess. L. at 10, *codified at* Hawaii Rev. Stat. § 408A-14(c) (1985). Rather than discharging MFC's liability, HILCGA simply substituted TGCH for the thousands of innocent individuals who had deposited their hard-earned funds with MFC.

Under these circumstances, Act 187's mere infusion of monies to allow TGCH to carry out its task could not run afoul of the Just Compensation Clause. *See Connolly,* 106 S. Ct. at 1018 (quoting *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978)). Nor could it possibly give rise to the kind of interference with Congress's scheme for rearranging companies in financial distress that would raise a substantial issue under the Supremacy Clause. *Cf. Fidelity Federal Savings & Loan Association v. De la Cuesta,* 458 U.S. 141 (1982).[12] Seen for what it is, Act 187 is nothing more than a routine spending measure that is readily sustainable under this Court's

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[12] Indeed, this Court has recently expressed its concern that Congress's exercise of its Bankruptcy Clause powers should not be broadly read to interfere with traditional state functions. *See Kelly v. Robinson,* 107 S. Ct. 353 (1986).

precedents, *e.g., Dandridge v. Williams,* 397 U.S. 471 (1970). Certainly the Hawaii Legislature might rationally have concluded that MFC's innocent depositors, rather than its equity holders, were more deserving of relief from the public fisc. Here, that is all the Constitution requires. *See Williamson v. Lee Optical Co.,* 348 U.S. 483, 488 (1955).

Petitioners' remaining attacks on the reorganization plan, which implicate the Bankruptcy Court's application of Title 11, rather than Act 187, are also meritless, even if they are open to review. As the Trustee submitted, and as the Bankruptcy Court agreed, TGCH's assumption of more than $27.5 million of MFC's liabilities to depositors was, at confirmation, adequate consideration for transfer of MFC's assets, given the value of those assets, MFC's debts, and particularly in light of TGCH's decision to *waive* its $12.6 million claim against MFC arising out of assumption of depositor claims. The Trustee also stated that, even if MFC's assets generated unexpected profits, the proceeds would first be subject to unsatisfied depositor claims for lost post-petition interest. *See* Pet. App. at I-12. Petitioner has not shown that these findings are "illogical or implausible." *Anderson v. Bessemer City,* 470 U.S. 564, 577 (1984). Further review would thus only require this Court to add its imprimatur to the findings supporting the liquidation.

That TGCH, or the State of Hawaii, by virtue of its claims against TGCH, might realize speculative gains on the property transferred pursuant to the plan, Pet. at 3, cannot present any substantial federal question. A risk that a transferee in liquidation might wind up with what turns out to be a gold mine is always present in bankruptcy. But such speculative

gains do not enjoy substantive protection. *See Yolo County,* 106 S. Ct. at 2569 n.9; *cf. United States v. Security Industrial Bank,* 459 U.S. 70, 75 (1982). Congress has made plain that, if a reorganization plan is "fair and equitable," and otherwise meets the requirements of bankruptcy law, a corporation in Chapter 11 may be liquidated at the current, discounted value of its property.[13] The Trustee's plan amply met these standards, and the Bankruptcy Court was well within its authority in entering its order on October 2, 1985 confirming the plan. Claims by MFC's equity shareholders were properly extinguished, and Petitioner has received no less than his "just due."

CONCLUSION

For the foregoing reasons, the writ should be denied.

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[13] *See* 11 U.S.C. §§ 1123(a)(5)(D), 1129(a)(11), 1129(b)(2).

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF HAWAII

[Filed Oct. 2, 1985]
CASE NO. 83-0065
(Chapter 11)
FINDINGS OF FACTS AND
CONCLUSIONS OF LAW RE
CONFIRMATION OF PLAN
DATE: September 30, 1985
TIME: 1:30 p.m.

In re

MANOA FINANCE COMPANY, INC., a Hawaii corporation,

Debtor.

A hearing to confirm the "Plan of Reorganization (Including Disclosure Statement) proposed by Charles R. Klenske, Chapter 11 Trustee" dated August 16, 1985 (the "Plan"), was held before the undersigned United States District Judge on September 30, 1985.

The Court having considered the Plan, the evidence, both oral and documentary, presented by the Trustee in support of the Plan, the arguments of the counsel present at the hearing, the memoranda submitted by various parties, and for good cause shown, the Court hereby makes the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. The Chapter 11 reorganization case of Manoa Finance Company, Inc., a Hawaii corporation, Debtor ("MFC") was commenced by the filing of an involuntary petition under Chapter 11 of the Bankruptcy Code on February 10, 1983.

2. The Court appointed Charles R. Klenske to act as Chapter 11 Trustee of MFC on July 1, 1983. Since that

date, Charles R. Klenske has acted as the duly-appointed and qualified Chapter 11 Trustee of MFC.

3. On August 19, 1985, the Trustee filed his "Notice of Motion for Order Authorizing the Filing of Plan of Reorganization Combined with Disclosure Thereon; Memorandum of Points and Authorities in Support Thereof" ("Motion"). On August 27, 1985, following a hearing on the Motion before this Court, the Court authorized the Trustee to distribute the proposed Plan to all creditors and equity security holders of MFC. The Court further established September 30, 1985 as the date for a hearing on confirmation of the proposed Plan.

4. Notice of the September 30, 1985 confirmation hearing was duly served by the Trustee on all creditors, equity security holders and other parties entitled to notice, along with copies of the proposed Plan.

5. There was an objection filed to confirmation of the Plan by Hirotoshi Yamamoto.

6. The Plan contemplates payment in full of the amounts owed to creditors whose claims are included in Classes 1, 2 and 3. These Classes are not impaired by the Plan, and are deemed to have accepted the Plan.

7. Classes 4, 5, 6 and 7 will receive nothing under the Plan, and are deemed to not have accepted the Plan.

8. The Plan complies with all provisions of Chapter 11 of the Bankruptcy Code and has been proposed in good faith and not by any means forbidden by law.

9. Each holder of a claim or interest has accepted the Plan, or will receive or retain under the Plan property of a value, as of the Effective Date of the Plan, that is not less than the amount that such holder would receive or retain if MFC were liquidated under Chapter 7 of the Bankruptcy Code on such date.

10. All payments made or promised by MFC or by a person acquiring property under the plan or by any other person for services or for costs and expenses, or in connection with the Plan and incident to the case, have been fully disclosed to the Court and are reasonable, or, if to be fixed after confirmation of the Plan, will be subject to the approval of the Court.

11. Because MFC will be dissolved following the confirmation of the Plan and the closing of MFC's case, there are no persons who are to be directors or officers or voting trustees of MFC following confirmation of the Plan and, consequently, the identities, qualifications and affiliations of any such persons are not required to be disclosed in the Plan. Similarly, it is not necessary for MFC's corporate charter to be amended pursuant to the Plan to prohibit the issuance of non-voting securities. The provisions of Chapter 11 which require regulatory approval for any rate changes set forth in a Chapter 11 plan of reorganization are inapplicable to MFC.

12. The Plan is feasible, because the Trustee will likely have the funds necessary to make the payments provided for in the Plan.

13. The Plan does not discriminate unfairly against claims and interests included in Classes 4, 5, 6 and 7.

14. The Plan is "fair and equitable" with respect to claims and interests included in Classes 4, 5, 6 and 7.

15. Creditors holding claims in Classes 6 and 7 have accepted the Plan.

16. The sale of assets to Thrift Guaranty Corporation of Hawaii ("TGC") contemplated by the Plan constitutes a liquidation of the assets of MFC. The Trustee is not conducting the business of MFC in connection with the sale to TGC.

17. Except as contemplated by the Plan, confirmation of the Plan is not likely to be followed by the liquidation

of MFC or the need for further financial reorganization of MFC.

18. Any of the foregoing findings of fact which are deemed to constitute conclusions of law are hereby incorporated as conclusions of law.

CONCLUSIONS OF LAW

19. The United States District Court has original subject matter jurisdiction over cases arising under Title 11 of the United States Code.

20. Such "notice and a hearing" as is required by the Bankruptcy Code and the Bankruptcy Rules with respect to the Plan has been duly given.

21. All the requirements of Section 1129 of the Bankruptcy Code required for confirmation of the Plan have been met.

22. The Trustee is authorized to carry out the provisions of the Plan, including the performance of his obligations under the proposed Agreement of Purchase and Sale Pursuant to Plan of Reorganization" attached as Exhibit A to the Plan.

23. The entry of this order, and the payment in full of Allowed Depositor Claims provided for in the Plan shall operate and constitute as a complete release, discharge and waiver of any and all claims, of whatever nature, whether legal or equitable, contingent, liquidated or unliquidated, which exist, may exist, have been asserted or might be asserted by the holders of Allowed Depositor Claims against TGC, any of its officers, directors, agents, employees or servants; its member institutions or their officers, directors, agents, employees and servants; and the State of Hawaii, and all of its officers, agents, employees, and servants. The effect of this order shall be to bar any action which has been commenced, or might hereafter be

commenced, against TGC or the State of Hawaii by holders of Allowed Depositor Claims arising from or related to the business or activities of MFC, or the issuance of thrift accounts by MFC.

24. The entry of this order and the payment in full of Allowed Depositor Claims shall operate as a dismissal with prejudice of the action filed on February 28, 1985 by the Official Creditors' Committee of MFC against TGC.

25. The provisions of Section 237-43 and 231-33(b) of the Hawaii Revised Statutes which pertain to payment of taxes under certain bulk transfers are inconsistent with federal law pertaining to the imposition of state taxes on bankrupt estates. Accordingly, neither the Trustee nor TGC is required to file the report of Bulk Sale with the Department of Taxation which is described in Section 237-43 of the Hawaii Revised Statutes, and the State of Hawaii is not authorized to collect any transfer tax from either the Trustee or TGC. Further, no lien in favor of the State of Hawaii shall attach to the assets sold to TGC under Section 231-33 (b) of the Hawaii Revised Statutes.

26. The Plan should be confirmed.

DATED: Honolulu, Hawaii, September 30, 1985.

/s/ SAMUEL P. KING
United States District Judge

APPENDIX B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF HAWAII

[Filed Oct. 11, 1985]
CASE NO. 83-0065
(Chapter 11)

NOTICE OF APPEAL OF ORDER
Confirming Trustee Klenske's
Plan of Reorganization

DATED: OCTOBER 2, 1985

In Re:

MANOA FINANCE COMPANY, INC. a Hawaii Corporation

Debtor.

HIROTOSHI YAMAMOTO, voluntary petitioner, Chapter 11, and true debtor-in-possession, hereby files Notice of Appeal of Order Confirming Trustee Klenske's Reorganization Plan, which order was dated, october 2, 1985.

The specifities of the Plan being appealed are as follows:

ARTICLE I, C-3 Securities of MFC As of effective date, the outstanding Common and preferred stock of MFC shall be cancelled.

ARTICLE I, C-4 Disputed Claims

(ii) *DISTRIBUTION* .....

Any property remaining after all disputes over claims have been determined and all administration and othe claims have been paid in full *shall be returned to TGC. (Thrift Guaranty Corporation)*

Underscore and parenthesis supplied.

The basis of this Appeal is the 14th Amendment to the Constitution of the United States.

This Amendment prohibits the State of Hawaii from confiscating the property rights of the Preferred and Common Stockholders of Manoa Finance Company, in favor of Thrift Guaranty Corporation. To wit:

AMENDMENT 14

Civil Rights

This amendment was proposed on June 13, 1866, and ratified on July 9, 1868.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DATED: Honolulu, Hawaii, October 11, 1985

/s/ HIROTOSHI YAMAMOTO
HIROTOSHI YAMAMOTO, pro se

APPENDIX C

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA. No. 85-2692

DC Hawaii Cv-83-00065

STIPULATION OF DISMISSAL OF APPEAL

In re

MANOA FINANCE COMPANY, INC., a Hawaii corporation,

Debtor.

[Received in the Court of Appeals Dec. 13, 1985]

STIPULATION OF DISMISSAL OF APPEAL

Appellant Hirotoshi Yamamoto and Appellee Charles R. Klenske, Trustee, hereby stipulate that (1) this appeal, initiated by the Notice of Appeal of Order filed by Appellant on October 11, 1985, shall be dismissed, (2) each party to this appeal shall bear his own costs, and (3) the dismissal of this appeal by Hirotoshi Yamamoto shall not prevent his from instituting other actions or proceedings against other parties related to or involved with Manoa Finance Company, Inc.

DATED: Honolulu, Hawaii December 9, 1985.

/s/ HIROTOSHI YAMAMOTO
Hirotoshi Yamamoto, Pro Se
Appellant

/s/ JAMES FEDER
James J. Feder

Attorney for Charles R. Klenske, Trustee

Appellee

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
DEC. 17, 1985
CA NO. 85-2692

DC NO. CV 83-00065

HAWAII

ORDER

In re:

MANOA FINANCE COMPANY, INC., a Hawaii corp.,

Debtor.

CHARLES E. KLENSKE, Trustee in reorganization,
Plaintiff/Appellee,

-vs-

GEORGE WM. M. GOO; ROBERT S. TERAMOTO, *et al.*,
Defendants.

and

HIROTOSHI YAMAMOTO,
Defendant/Appellant,

ENTRY OF DISMISSAL

Pursuant to Rule 42 (b), Federal Rules of Appellate Procedure, and the stipulation submitted by the parties, dismissal of this appeal is herewith entered.

(XX) Each party to bear its own costs.

( ) Costs to be apportioned as agreed in the submitted stipulation.

A certified copy of this order sent to the district court shall act as and for the mandate of this court.

FOR THE COURT:

Cathy Catterson
Clerk of Court
By: /s/ DAVE DOMINY
Dave Dominy
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 30 1985

CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

No. 85-2692

DC# C-83-00065
Hawaii

ORDER

In re:

MANOA FINANCE COMPANY, INC., a Hawaii corporation,

Debtor.

CHARLES E. KLENSKE, Trustee,

Plaintiff-Appellee,

vs.

GEORGE WH. M. GOO, *et al.*,

Defendants,

and

HIROTOSHI YAMAMOTO,

Defendant-Appellant,

Before: NELSON, REINHARDT and WIGGINS, Circuit Judges

Appellant has no standing to appeal the district court's order approving the plan of reorganization. The order is summarily affirmed.

APPENDIX F

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF HAWAII

[Filed Dec. 16, 1983]

BK. NO. 83-65

In Re

MANOA FINANCE COMPANY, INC., a Hawaii corporation,

Debtor.

ADVERSARY PROCEEDING
NO. 83-222

COMPLAINT; SUMMONS; EXHIBITS 1-29

CHARLES R. KLENSKE, Trustee in Reorganization for MANOA FINANCE COMPANY, INC.,

Plaintiff,

vs.

HIROTOSHI YAMAMOTO, GEORGE W. H. GOO, ROBERT S. TERAMOTO, MASAYUKI TOKIOKA, SHIZUKO YAMAMOTO, SAKAE TAKAHASHI, ELIZABETH TAKAHASHI, MAKAHA LAUNDRY, INC., MAKAHA REEF, INC., TAKAHASHI-YAMAMOTO JOINT VENTURES, SSK INVESTMENTS, INC. and ASIAN AMERICAN MEDICAL CLINIC OF SAN FRANCISCO,

Defendants,

COMPLAINT

COMES NOW Plaintiff CHARLES R. KLENSKE, Trustee in Reorganization for Manoa Finance Company, Inc., by and through his attorneys, Carlsmith, Carlsmith, Wichman and Case, and Jones, Day, Reavis & Pogue, and for Complaint against Defendants HIROTOSHI YAMAMOTO, GEORGE W. H. GOO, ROBERT S. TERAMOTO, MASAYUKI TOKIOKA, SHIZUKO YAMAMOTO, SAKAE TAKAHASHI, ELIZABETH TAKAHASHI, MAKAHA

LAUNDRY, INC., MAKAHA REEF, INC., TAKAHASHI-YAMAMOTO JOINT VENTURES, SSK INVESTMENTS, INC. and ASIAN AMERICAN MEDICAL CLINIC OF SAN FRANCISCO, alleges and avers as follows:

COUNT I

1. Plaintiff CHARLES R. KLENSKE, Trustee in Reorganization for Manoa Finance Company, Inc. (hereinafter referred to as "Plaintiff"), was appointed the Trustee in Reorganization for Manoa Finance company, Inc., a corporation organized and existing under the laws of the State of Hawaii, in the United States Bankruptcy Court for the District of Hawaii, on June 30, 1983.

2. Jurisdiction of this matter is conferred upon this Court by the provisions of 28 U.S.C. § 1471 (Supp. 1983) and 28 U.S.C. §§ 1334 and 1331.

3. Plaintiff is of the information and belief and on such information and belief alleges and avers that Defendants HIROTOSHI YAMAMOTO, GEORGE W. H. GOO, ROBERT S. TERAMOTO, MASAYUKI TOKIOKA, SHIZUKO YAMAMOTO, SAKAE TAKAHASHI and ELIZABETH TAKAHASHI are and were at all times relevant herein residents of the City and County of Honolulu, State of Hawaii.

[Material Deleted in Printing]

COUNT VIII

73. Plaintiff repeats and realleges and incorporates by reference herein the allegations contained in paragraphs 1 through 72 of the Complaint as though the same were more fully set forth herein.

74. Manoa Investment Company is a wholly-owned subsidiary of MFC.

75. At various times during the period from December 30, 1968 to December 31, 1975, Defendants YAMAMOTO,

for value received, executed and delivered to Manoa Investment Company, Inc. certain promissory notes, totalling in the aggregate the sum of NINE HUNDRED SEVENTY-EIGHT THOUSAND FOUR HUNDRED NINETY-SEVEN AND 12/100 DOLLARS ($979,497.12); copies of the said promissory notes are attached hereto as Exhibits 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 and made a part hereof by reference.

76. Manoa Investment Company, Inc. has assigned the aforesaid promissory notes to MFC.

77. Under the terms of the aforesaid promissory notes, the notes are payable on demand.

78. Plaintiff has made due demand upon Defendant YAMAMOTO for payment of the said notes but he has failed and neglected to pay the amounts due under the said notes.

79. There is now due and owing from Defendant YAMAMOTO the principal balance of NINE HUNDRED SEVENTY-EIGHT THOUSAND FOUR HUNDRED NINETY-SEVEN AND 12/100 DOLLARS ($978,497.12), together with unpaid accrued interest thereon to November 30, 1983 of FOUR HUNDRED TEN THOUSAND FOUR HUNDRED SIXTY-SEVEN AND 54/100 DOLLARS ($410,457.54), for a total amount due and owing of $1,388,964.66, plus the appropriate per diem rates from and after November 30, 1983, plus attorneys' fees and costs.

[Material Deleted in Printing]

COUNT XVII

130. Plaintiff repeats and realleges and incorporates by reference herein the allegations contained in paragraphs 1 through 129 of the Complaint as though the same were more fully set forth herein.

131. On or about May 1, 1977, one Japan Center Car Wash, Inc. made, executed and delivered to National Braemar, Inc. a promissory note in the principal sum of $131,499.83; said monies were loaned by National Braemar, Inc. to Japan Center Car Wash, Inc. for improvements to be built on the aforesaid Car Wash Property; a copy of the said promissory note is attached hereto as Exhibit 29 and made a part hereof by reference.

132. In addition, National Braemar, Inc. advanced the total sum of $19,885.23 to Japan Center Car Wash, Inc., also for improvements to be built on the aforesaid car wash property.

133. Defendant YAMAMOTO assumed all of the liabilities of Japan Center Car Wash, Inc. upon the latter's dissolution.

134. National Braemar, Inc. has assigned the aforesaid promissory note and receivables to MFC.

135. The aforesaid promissory note matured on May 1, 1980, but Defendant YAMAMOTO has failed and neglected to pay the same, and all sums due thereunder (including the principal balance of $151,499.83 and interest at ten percent (10%) interest per annum, totalling $41,536.71 as of November 30, 1983 and $41.51 per diam thereafter, plus attorneys' fees and costs) are due and payable.

136. In addition, Defendants YAMAMOTO owes the advanced sum of $19,885.25 plus interest to MFC.

[Material Deleted in Printing]

WHEREFORE, Plaintiff prays that judgments be entered in his favor and against Defendants, and each of them, jointly and severally, as follows:

1. For damages in an amount to be shown at the time of trial;

2. For an order requiring Defendants SSK INVESTMENTS, INC. and ASIAN AMERICAN MEDICAL

CLINIC OF SAN FRANCISCO to make the payments on their purchase of the Car Wash Property to MFC or to interplead the said payments into the court;

3. For punitive damages in the sum of $1,000,000.00;

4. For judgment in the amount of treble the damages suffered by MFC, to be shown at the time of trial, or $1,000, whichever is greater;

5. For costs of suit incurred herein, including attorneys' fees and costs; and

6. For such other and further relief as the Court deems just and proper in the premises.

DATED: Honolulu, Hawaii, December 16, 1985.

/s/ JOSEPH T. KIEFER
BURNHAM E. GREELEY
JOSEPH T. KIEFER
JAMES A. KAWACHIKA

Special Counsel for Plaintiff
Charles R. Klenske, Trustee in
Reorganization for Manoa Finance
Company, Inc.

APPENDIX G

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF HAWAII

[Filed Jan. 18, 1984]
BK NO. 83-00065

ANSWER TO COMPLAINT

83-0222

In Re

MANOA FINANCE COMPANY, INC., a Hawaii corporation,

Debtor.

CHARLES R. KLENSKE, Trustee in Reorganization for MANOA FINANCE COMPANY, INC.,

Plaintiff,

vs.

HIROTOSHI YAMAMOTO, GEORGE W. H. GOO, ROBERT S. TERAMOTO, MASAYUKI TOKIOKA, SHIZUKO YAMAMOTO, SAKAE TAKAHASHI, ELIZABETH TAKAHASHI, MAKAHA LAUNDRY, INC., MAKAHA REEF, INC., TAKAHASHI-YAMAMOTO JOINT VENTURES, SSK INVESTMENT, INC. and ASIAN AMERICAN MEDICAL CLINIC OF SAN FRANCISCO,

Defendants.

ANSWER TO COMPLAINT

Comes now Defendant HIROTOSHI YAMAMOTO (hereinafter referred to as "Defendant"), by and through his attorneys, UKISHIMA & MATSUBARA, and in answer to the Complaint filed herein, alleges and avers as follows:

FIRST DEFENSE:

The Complaint fails to state a claim against Defendant upon which relief can be granted.

SECOND DEFENSE:

COUNT I

1. Defendant admits the allegations contained in Paragraphs 1 through 5, inclusive, 7, 8, 10, 11, 13, 14, 16, 17, 19, 20, 22, and 23, of the Complaint.

[MATERIAL DELETED IN PRINTING]

COUNT VIII

40. In answer to Paragraph 73 of the Complaint, Defendant incorporates by reference his answers to Paragraphs 1 through 72 of the Complaint.

41. Defendant admits the allegations contained in Paragraph 74 of the Complaint.

42. Defendant denies the allegations contained in Paragraph 78 of the Complaint.

43. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 76 of the Complaint, and therefore, denies the same.

44. In answer to Paragraphs 75 and 77, Defendant states that the promissory notes attached as Exhibits 11 through 21 of the Complaint speak for themselves.

45. In answer to Paragraph 79, Defendant admits that there is now due and owing a certain sum from Defendant to Manoa Investment Company. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said Paragraph, and therefore, denies the same.

46. Defendant denies each and every other allegation not herein specifically answered.

[MATERIAL DELETED IN PRINTING]

COUNT XVII

97. In answer to Paragraph 130 of the Complaint, Defendant incorporates by reference his answers to Paragraphs 1 through 129 of the Complaint.

98. Defendant admits the allegations contained in Paragraph 133 of the Complaint.

99. Defendant denies the allegations contained in Paragraphs 135 and 136 of the Complaint.

100. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 132 and 134 of the Complaint, and therefore, denies the same.

101. In answer to Paragraph 131, Defendant admits that on or about May 1, 1977, Japan Center Car Wash, Inc., executed and delivered to National Braemar, Inc., a promissory note in the principal sums of $131,499.83, and that said monies were loaned for certain improvements to be built on the Car Wash Property. Defendant denies the remaining allegations contained in said Paragraph.

102. Defendant denies each and every other allegations not herein specifically ansewered.

[MATERIAL DELETED IN PRINTING]

THIRD DEFENSE:

Defendant intends to rely upon the defense of failure to join an indispensable party or parties.

FOURTH DEFENSE:

Defendant intends to rely upon the defense of accord and satisfaction.

FIFTH DEFENSE:

Defendant intends to rely upon the defenses of waiver, estoppel, and laches.

SIXTH DEFENSE:

Defendant intends to rely upon the defense knowledge or acquiescence.

SEVENTH DEFENSE:

Defendant intends to rely upon the defense of consent.

EIGHTH DEFENSE:

Defendant intends to rely upon the defense of the availability of other adequate remedies.

NINTH DEFENSE:

Defendant intends to rely upon the defense that there has been no irreparable harm.

TENTH DEFENSE:

Defendant intends to rely upon the defense that the questions and issues which are the subject matter of this proceeding are premature.

ELEVENTH DEFENSE:

Defendant intends to rely upon the defense that his due process rights protected under the United States Constitution and the Constitution of the State of Hawaii, have been violated.

WHEREFORE, Defendant demands that the Complaint be dismissed and that he have judgment against Plaintiff and that he be awarded his costs, reasonable attorneys' fees, and such other further relief as this Court deems just and proper in the premises.

DATED: Honolulu, Hawaii, January 18, 1984.

OF COUNSEL:
UKISHIMA & MATSUBARA
A Law Corporation

DANIEL S. UKISHIMA
JAY T. SUEMORI
CRAIG G. H. YIM
Attorneys for Defendant
HIROTOSHI TAMAMOTO

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed Feb. 20, 1986]
No. 84-2807

D.C. No. CV 83-0222
BK 83-00065

PETITION FOR REHEARING
SUGGESTED REHEARING EN BANC

Certificate of Service

Exhibits A, B addendum

In re:

MANOA FINANCE COMPANY, INC., a Hawaii Corporation,

Debtor.

CHARLES R. KLENSKE, Trustee in Reorganization,
Plaintiff-Appellee,

vs.

GEORGE W. H. GOO, ROBERT S. TERAMOTO, *et al.*
Defendants,

and

HIROTOSHI YAMAMOTO,
Defendant-Appellant.

PETITION FOR REHEARING

Introduction

This Petition on the Judgment of the Court filed February 4, 1986 and received by appellant on February 10, 1986 is to direct the Court's attention to:

1. Material facts in the record and of public knowledge which have been overlooked in the decision.

2. A material change in the State Laws governing Thrift Guaranty Corporation, a State sponsored insurance company which had defaulted in its guaranteed $10,000, insured payment to each depositor. This event occurred after case was submitted and which appears to have been overlooked by the panel.

1. Material Facts Over-looked

1. The indebtedness incurred (partial summary judgment of $1.6 million) was a transfer of funds from subsidiary, Manoa Investment company, (a *non-regulated* company) to Manoa Finance Company (a *regulated* company) in order to meet the latter's 10 to 1 debt to capital ratio. And not for Yamamoto's personal gain or benefit. This practice was legal and condoned for many years until the State outlawed it. There is therefore the issue of expost facto laws.

2. Even admitting this indebtedness, Manoa Finance Co. had an excess of $4,354,818.87 in assets over liabilities at the time of the filing for Chapter 11. Since Yamamoto is the sole owner (100%) his net equity in the company of $4 million can more than cover the alleged indebtedness of $1.6 million. Thus the partial summary judgment of $1.6 million is innocuous.

3. Material from *extra-judicial source.*

It is public knowledge that Judge King has high media visibility. He has made the front page cover of the Mid-Week Magazine; quoted by the media as crying when he saw on TV old Japanese women standing before the closed doors of Manoa Finance Co. . And even such trivia was reported in the gossip column that he had to change his glasses in order not to be mistaken for Henry Kissinger.

Such extra-judicial considerations, together with his assignment to himself of the adversary proceedings (with a different case number); his postulating in open

court for his appointed trustee, Klenske; — all of which could hardly *not* be construed as having the appearance: of partiality. More to have the appearance of an attempt to maintain an unblemished record of his administration of the highly publicised Manoa Finance Co. proceedings for nothing more than the sake of his public image.

2. State Legislated Reorganization Plan

1. The State legislated Reorganization Plan, after this case was submitted, is a brazen and illegal attempt to succor the State sponsored Thrift Guaranty Corporation from its failure to pay the insured $10,000.00 guaranteed to each depositor. (*See Exhibits A-1 to A-12*)

2. The Plan provided for a liquidation sale of all assets of Manoa Finance Company to Thrift Guaranty Corporation, with the anticipated surplus of assets over liabilities to be retained by Thrift Guaranty Co. for its other debts to the State of Hawaii, rather than having such excess reverting back to the equity holders, in accordance with bankruptcy procedures and the guarantees of the 14th Amendment to the United States constitution.

3. The Plan for liquidation permits Trustee Klenske to move from Chapter 11 to chapter 7 under the ruse of reorganization, when in fact, it was liquidation to a sole purchaser, Thrift Guaranty Corporation. And denying equity holders of any residual benefits which must be contemplated in any plan of reorganization. Thus the State had legislated interference with the proceedings in the bankruptcy court.

4. Furthermore, the Plan has offered Trustee Klenske a $308,000.00 inducement for its adoption under the guise of commissions. (*See Exhibit B*)

5. The Plan is therefore a clear violation of the Constitution and laws of the United States relating to bankruptcy, which broach of no intervention, interference, or even parallel jurisdiction by or with the states.

6. The issue of the Plan is germane to the case at hand because it will deny Yamamoto of the Manoa Finance Company Estate's success in the Partial Summary Judgment of $1.6 million; which according to bankruptcy rules will inure back to him as the prime beneficiary of the Estate of Manoa Finance Company.

7. Under duress from public pressures incited by Trustee Klenske and a representative of thrift Guaranty's interest in the Plan, Yamamoto dropped his efforts to forestall the execution of the Plan, reserving the right to sue the instigators of the Plan.

CITATIONS

1. In *Moses Taylor,* 71 U. S. (Wall.) 478 (1967), it was established that beginning with the First Judiciary Act enacted by Congress in 1789, in *certain instances* the jurisdiction of the Federal Courts shall be exclusive of the several states.

2. Clarification of the "certain instances" was made in *Dowd Box Company v. Courtney,* 368 U. S. 502 (1962), where Justice Stewart declared:

> This Court's approach to the question of whether Congress has ousted State Courts of jurisdiction was enunciated by Mr. Justice Bradley in *Claflin v. Houseman* (citation omitted) and has remained unmodified through the years. 'The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in case arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed .... (and) the result of these discussions has in our judgment been ... to affirm the jurisdiction, where it is not excluded by express provision, or arising from the nature of the particular case."

Id. at 508.

3. Bankruptcy is one of the specific cases where Congress has made federal jurisdiction exclusive. Under 28 U. S. C. A. § 1334 (West Supp. 1984), it provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of *all matters* and proceedings in bankruptcy. (underscore supplied).

Also, under Article I, Sec. 8, cl. 4 of the United States Constitution, Congress was given the power "to establish uniform laws on the subject of Bankruptcies throughout the United States."

4. In compliance with the above mandate, Congress enacted the Bankruptcy Reform Act of 1978, as amended, Pub. L. No. 95-598 ("Bankruptcy Code") and the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-333.

5. In *Kalb v. Feuerstein,* 308 U. S. 433 (1940), protection is extended to the person and property of a debtor whom the bankruptcy law protects.

The Supreme Court stated:

> It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack. But, Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally. (footnote omitted.)

Id. at 438-39.

In absolute and unequivocal finality on the subject, the Court continued by stating that:

> The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and under this power congress can limit the jurisdiction which courts, State or Federal, can exercise over the *person and property* of a debtor who duly invokes the bankruptcy law. (Underscore supplied.)

Id. at 419.

3. Rehearing En Banc Suggested

Because of the issue of judicial conduct lacking the appearance of impartiality, and the constitutional question of the State's legislated interference with the bankruptcy proceedings in the Federal courts, a hearing en banc is respectfully requested.

DATED: Honolulu, Hawaii, February 14, 1986

/s/ HIROTOSHI YAMAMOTO
HIROTOSHI YAMAMOTO, pro se
for petitioner

APPENDIX I

ADDITIONAL FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 8, clause 4 of the United States Constitution provides in relevant part that

> The Congress shall have Power . . . [t]o establish . . . uniform laws on the subject of Bankruptcies throughout the United States[.]

The Fifth Amendment to the United States Constitution provides in relevant part that

> private property [shall not] be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

Section 1123(a)(5)(D) of Title 11, United States code, provides in relevant part that

> Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . provide adequate means for the plan's implementation, such as . . . sale of all or any part of the property of the estate, either subject to or free of any lien . . . .

Section 1129 of Title 11, United States Code, provides in relevant part that

> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> . . .
>
> (8) With respect to each class of claims or interests — (A) such class has accepted the plan;

or — (B) such class is not impaired under the plan.

. . .

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

. . .

(b)(1) . . . the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of [paragraph (a)(8)] if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

. . .

(b) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an

interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

APPENDIX J

STATUTORY AUTHORITY OF THE BANK EXAMINER OF HAWAII (NOW COMMISSIONER OF FINANCIAL INSTITUTIONS) AND THE HAWAII INDUSTRIAL LOAN AND INVESTMENT ACT OF 1937, AS AMENDED

Chapter 401, Hawaii Rev. Stat. (1985), with accompanying legislative history, provides in relevant part as follows:

§401-1 Division of financial institutions, commissioner of financial institutions, (a) The director of commerce and consumer affairs with the approval of the governor, shall appoint a fit and competent person to perform the duties of the commissioner of financial institutions, whose principal duty will be to examine financial institutions and who shall also be known as the "examiner of financial institutions."

* * *

[L 1913, c 78, §1; RL 1925, §1265; am L 1925, c 86, §1; RL 1935, §2220; am L 1939, c 49, §1; am L 1941, c 25, §1; RL 1945, §5821; am L 1951, c 264, §2; RL 1955, §133-1; am L Sp 1959 2d, c 1, §13; am L 1963, c 114, §3; HRS §401-1; am L 1982, c 203, §2 and c 204, §8; am L 1983, c 124, §17; am L 1985, c 269, §2]

* * *

§401-3 Inspection; examination; duties. Every bank, trust company, building and loan association, fiduciary company, industrial loan and investment company, or licensee under chapter 409 doing business in the State, excepting the national banks, shall be subject to the inspection of the commissioner.

* * *

[L 1913, c 78, §3; RL 1925, §1267; am L 1931, c 148, §1; RL 1935, §2222; am L 1937, c 230, §1; RL 1945, §3823; RL 1955, §135-3; HRS §401-3; am L 1979, c 48, §2; am imp L 1984, c 90, §1; am L 1985, c 269, §50]

* * *

§401-5 Illegal or unsafe practices; order directing discontinuance. When it appears to the commissioner from any examination or report that any bank, trust company, building and loan association, fiduciary company, industrial loan and investment company, or licensee under chapter 409 has committed any violation of the law, or is conducting its or the licensee's business in an unsafe or unauthorized manner, the commissioner shall, by an order in writing, direct the discontinuance of the illegal or unsafe or unauthorized practices and enforce strict conformity to the requirements of the law.

If any bank, trust company, building and loan association, fiduciary company, industrial loan and investment company, or licensee under chapter 409 fails to comply with the order within the time therein specified, then the commissioner may exercise such supervision, control, and management over such bank, company, association, or licensee, and its officers and its or the licensee's affairs and business as the commissioner may deem necessary for the public welfare; and further, if deemed necessary by the commissioner, the commissioner may invoke the powers granted the commissioner in section 401-12, providing for the appointment of a receiver, the provisions of which are extended and made applicable thereto.

Any failure or refusal to comply with an order of the commissioner to cease violating a statutory provision or lawful order in writing directing the discontinuance of illegal or unsafe or unauthorized practices, shall be deemed a violation of this chapter and punishable as provided in

section 401-20. [L 1931, c 148, §2; RL 1935, §2224; am L 1937, c 230, §2; RL 1945, §5825; am L 1951, c 99, §1; RL 1955, §135-5; HRS §401-5; am imp L 1984, c 90, §1; am L 1985, c 269, §50]

* * *

§401-12 Receiver, application for, appointment; duties. If the commissioner becomes satisfied that the capital of any corporation subject to the inspection of the commissioner has become impaired or reduced below the amount required by law, and the impairment or reduction is not made good as by the commissioner required, or if the commissioner becomes satisfied that the corporation or any person, firm, association, or copartnership subject to the inspection of the commissioner is conducting its or the person's business in an unsafe or unauthorized manner, so that the continuance of its or the person's business would be hazardous to the public, or those having funds in its control, or if the corporation, person, firm, association, or copartnership has violated this chapter or any other law relating thereto, or if the corporation, person, firm, association, or copartnership refuses to submit its or the person's books and papers and concerns to the inspection of the commissioner, or the commissioner's deputy, or if any officer of the corporation, person, firm, association, or copartnership unreasonably delays or refuses to be examined under oath, touching the affairs and condition of the corporation, person, firm, association, or copartnership, or if from any examination made, or report in this chapter provided for, the commissioner concludes that the corporation, person, firm, association, or copartnership is in an unsound or unsafe condition to transact its or the person's business so that it is unsafe and inexpedient to continue the same, the commissioner shall communicate these facts to the governor, and with the governor's concurrence, application may be made by the attorney general, on behalf

of the commissioner, to a judge or court of competent jurisdiction for the appointment of a receiver.

* * *

[L 1915, c 127, §1; RL 1925, §1275; RL 1935, §2231; am L 1937, c 230, §6; RL 1945, §5832; RL 1955, §135-14; HRS §401-12; am imp L 1984, c 90, §1; am L 1985, c 269, §5]

Chapter 408, Hawaii Rev. Stat. (1985), with accompanying legislative history, provides in relevant part as follows:

§408-1 Application of chapter. This chapter may be cited as the Industrial Loan Companies Act and shall be applicable to every person who engages in or attempts to engage in the business of an industrial loan company. [L 1937, c 231, pt of §1; am L 1939, c 75, pt of §1 (6782); RL 1945, §8802; RL 1935, §194-1; HRS §408-1; am L 1984, c 253, §1]

§408-2 Definitions. As used in this chapter and unless a different meaning appears from the context:

* * *

"Commissioner" means the commissioner of financial institutions of the State.

"Company" means any person to which this chapter or any portion of this chapter is applicable. The term "company" includes any foreign corporation doing business in the State.

"Consumer loan" means a loan made to a natural person primarily for a personal, family, or household purpose:

(1) In which the principal amount does not exceed $25,000 or in which there is an express written com-

mitment to extend credit in a principal amount not exceeding $25,000; or

(2) Such loan is secured by real property, or by personal property used or expected to be used as the borrower's principal dwelling.

"Contract" means credit agreements, loan agreements, promissory notes, and other documents constituting the contract for credit.

"Engage in the business of an industrial loan company" or "carry on the business of an industrial loan company" or "the industrial loan business" or any other term of similar import, means the loaning of money and charging, contracting for, or receiving interest, fees, compensation, or charges of whatever nature or kind for the use of money where the interest charged, contracted for, or received is in excess of the interest permitted by law other than this chapter; provided that direct financing to customers by mercantile firms or by persons engaged in the mercantile business shall not be deemed engaging in business as an industrial loan company.

"Industrial loan company" means any person who engages in the industrial loan business as defined in this chapter; provided that this definition shall not be construed to include banks, trust companies, savings and loan associations, credit unions, mortgage companies, pawnbrokers, or licensees under chapter 409. As used in this chapter the term "savings and loan association" includes "building and loan association."

"Interest" includes interest, discount, points, loan fees, and loan origination charges, if charged, contracted for, or received for the use of money, but excludes other charges, including the charges permitted by section 408-15(e) and (j).

* * *

"Person" means a natural person or an organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or governmental unit.

* * *

[L 1937, c 231, pt of §1; am L 1939, c 75, pt of §1 (pt of 6782A); RL 1945, §8803; RL 1955, §194-2; am L Sp 1959 2d, c 1, §15; am L 1963, c 114; §3; HRS §408-2; am L 1976, c 103, §2; am L 1980, c 114, §1; am L 1982, c 203, §8; L 1984, c 253, §3; am L 1985, c 269, §30]

* * *

§408-13 Capital stock, (a) The capital stock of any corporation, desiring to engage in the industrial loan business and to issue investment or thrift certificates or debentures to the public, shall be not less than $300,000, which capital stock shall be fully paid to the corporation in cash. No commission, fees, brokerage, or other compensation of any kind shall be paid, either directly or indirectly, to any person, firm, or corporation for the sale of any stock of such corporation, except out of assets in excess of the minimum capital of $300,000 required by this chapter. The amount of the capital stock shall not, at any time thereafter, be voluntarily reduced below the amount originally paid in, except as may be permitted and in the manner provided by the general corporation laws; provided that the amount of the capital stock shall at all times be at least $300,000. This provision also applies to an industrial loan company that opens an additional office or place of business after July 31, 1977.

(b) The capital stock of any corporation which desires to engage in the industrial loan business but not to issue investment or thrift certificates to the public shall be not less than $100,000, which capital stock shall be fully paid to the corporation in cash. The amount of the capital stock

of such corporation shall at all times be not less than $100,000. §L 1937, c 231, pt of §1; am L 1939, c 75, pt of §1(6782J); RL 1945, §8813; RL 1955, §194-13; HRS §408-13; am L 1971, c 52, §2 am L 1977, c 28, §1 am L 1983, c 167, §17]

§408-14 Specific powers. (a) Every industrial loan company, in addition to the powers exercisable by or conferred upon it under or by the general corporation law of the State, or by any other provision of this chapter, shall possess and may exercise the following powers:

(1) To borrow money upon its own secured or unsecured notes;

(2) To lend money upon individual credit or upon the security of comakers, personal endorsement, or the pledge or mortgage of real or personal property or chooses in action, or upon any combination of such credit and security, and to contract for such interest, discount, or other consideration as is permitted by this chapter, and to sell or broker, loans or contracts, in whole or in part, to other lenders, and charge or retain a fee for the originating, selling, brokering, or servicing of such loans or contracts;

(3) To discount, purchase, or otherwise acquire notes, installment contracts, warehouse receipts, or other chooses in action,

(4) To establish branches within the State with the prior written approval of the commissioner,

(5) To finance purchases for others by taking title to merchandise temporarily and only for the purpose of securing loans entered into for the purchases;

(6) To issue and sell certificates for the payment of money at any time, either fixed or uncertain, including without limitation evidences of thrift accounts as defined in and subject to chapter 408A, and to receive

amounts invested therein in installments or otherwise, with or without allowance of interest on the investments; provided no company may issue the certificates or receive those amounts unless the company is a corporation organized and operating in good standing under the laws of this State. A company may, but need not, require an investor to subscribe to a certain amount of investment in such certificates, subject to minimum or maximum investments required by law or rules. Nothing herein shall be construed to authorize any industrial loan company to receive deposits or to create any liability due on demand; and

(7) To become the legal or beneficial owner of tangible personal property and other tangible property for the purpose of leasing such property, to obtain an assignment of a lessor's interest in a lease of such property, and to incur obligations incidental to its position as the legal or beneficial owner and lessor of the leased property.

(b) The certificates in subsection (a), including the evidence of the thrift accounts, shall not be issued by any industrial loan company without receiving the prior written approval of the commissioner, and shall bear upon the face of the instrument the words, "THIS IS NOT A CERTIFICATE OF DEPOSIT."

(c) No industrial loan company shall have outstanding at any time its certificates, debentures, or both registered under chapter 485 in an aggregate sum in excess of ten times the aggregate amount of its paid-up capital and surplus; provided the commissioner may limit the ratio of certificates, debentures, or both to capital and surplus which may be issued by any industrial loan company if the commissioner determines that the lower ratio is necessary in the public interest. In determining the ratio to be permitted, the commissioner shall consider all relevant cir-

cumstances, including, without limitation, the following factors:

(1) The length of time the company has been in operation;

(2) Ratio of losses to volume of loans made and contracts purchased;

(3) The creation and maintenance of adequate reserve for losses;

(4) Charge-off of uncollectable accounts;

(5) The amount of growth of undivided profits, earned surplus, or both;

(6) Diversification of character and source of loans made and contracts purchased;

(7) Creation and maintenance of adequate internal controls; and

(8) Sound and efficient management.

(d) Every industrial loan company shall maintain and have on hand at all times a reserve composed of cash and other securities in an amount equal to the sum of seven per cent of its liabilities on outstanding certificates and debentures with an original term not exceeding one year and five per cent of its liabilities on outstanding certificates and debentures with an original term of one year or more. The reserve shall not be pledged.

This reserve shall be determined as of a particular date and shall be based upon the daily average of all outstanding certificates and debentures of the immediate preceding seven calendar days. During a succeeding seven calendar day period, the average daily balance of the reserve shall equal or exceed the reserve amount. At the end of the seven calendar day period, a new reserve amount shall be determined based upon the daily average of the immediate preceding seven calendar days and for the next succeeding

seven calendar day period, the average daily balance of the reserve shall equal or exceed such new amount. Determination of reserve requirements shall be made on forms approved by the commissioner and shall be computed within two working days after the date of determination.

(e) Upon any failure to maintain the ratio required in subsection (c) or the reserve required in subsection (d), the industrial loan company shall:

(1) Promptly take action to correct the deficiencies;

(2) Cease making any loans or other advances or extensions of credit until the deficiencies are corrected; and

(3) Notify the commissioner immediately, in case of any deficiency in the ratio requirement, and within two working days in case of any deficiency in the reserve requirement.

The commissioner, in writing, may direct specific directors and officers of any industrial loan company in violation of this section to take actions reasonably necessary to comply with this section.

(f) Cash reserves shall be limited to cash in banks and on hand, bank or savings and loan certificates of deposit, direct United States, State, or county government securities, and passbook deposits in banks or savings and loans. The cash reserve shall at all times equal not less than fifty per cent of the reserve that is required by this section.

(g) Other securities shall be limited to direct obligations of the United States government, State, or county, bankers acceptances approved by the commissioner, irrevocable lines of credit in a form acceptable to the commissioner, and securities listed on the New York stock exchange or the American stock exchange. Not more than twenty-five per cent of the total reserve of cash and other security shall be held in securities listed on the New York stock

exchange or the American stock exchange. [L 1937, c 231, pt of §1; am L 1939, c 75, pt of §1(6782K); RL 1945, §8814; am L 1953, c 80, §2; RL 1955, §194-14; HRS §408-14; am L 1969, c 97, §1 and c 120, §3; am L 1972, c 113, §1; am L 1976, c 103, §3 and c 186, §1; am L 1979, c 71, §2; am L 1982, c 147, §22; am L 1983, c 253, §1 and c 167, §8; am L 1984, c 234, §6; am L 1985, c 269, §50]

APPENDIX K

THE HAWAII INDUSTRIAL LOAN COMPANY GUARANTY ACT OF 1977, AND THE 1983 AMENDMENTS THERETO

Chapter 408A, Hawaii Rev. Stat. (Supp. 1977), the original codification of the Hawaii Industrial Loan Company Guaranty Act of 1977 ("HILCGA"), provides in relevant part:

§408A-1 Title. This chapter shall be known as the Industrial Loan Company Guaranty Act.

§408A-2 Purpose and policy. (a) The purpose of this chapter is to assist in stabilizing the industrial loan industry by providing for a guarantee payment of the obligations of members up to $10,000 for each thrift account, subject to the express limitations of this chapter.

(b) Because of the increased use of industrial loan companies by the people within this State, it is hereby declared to be in the best interest of the public and the policy of the State to provide for the guarantee of thrift accounts in these institutions.

§408A-3 Definitions. As used in this chapter unless the context otherwise requires:

(a) "Bank examiner" means the bank examiner as provided in section 401-1.

(b) "Guaranty corporation" means the Thrift Guaranty Corporation of Hawaii.

(c) "Member" means an industrial loan company licensed and regulated by chapter 408 which:

(1) On [April 1, 1977,] has outstanding thrift account obligations and is not the subject of any bankruptcy, insolvency, reorganization or receivership proceedings in either Federal or State courts; or

(2) After [April 1, 1977,] becomes a member in accordance with section 408A-30.

(d) "Applicant" means an industrial loan company which subsequent to [April 1, 1977,] obtains the written approval of the bank examiner to issue thrift account obligations.

(e) "Thrift account" includes the principal invested in investment or thrift certificates (including thrift passbooks) or debentures, whether on installment bases or fully paid and however evidenced, plus unpaid interest accrued thereon; provided that "thrift account" shall not include single transactions in which the investor invests an amount of $250,000 or more and the instrument evidencing such transaction states on its face that it is not protected by the Thrift Guaranty Corporation of Hawaii.

(f) "Independent activity" means activity other than that directed solely at increasing guarantee coverage under section 408A-9.

(g) "Board" means the board of directors of the Thrift Guaranty Corporation of Hawaii.

§408A-4 Establishment of guaranty corporation. (a) Within sixty days after [April 1, 1977,] all industrial loan companies operating on [April 1, 1977,] which have issued and have outstanding thrift account obligations shall establish a nonprofit corporation pursuant to chapter 416, to operate under the name "THRIFT GUARANTY CORPORATION OF HAWAII". Initial administrative and organizational expenses shall be borne equally by the organizing companies. The initial bylaws and any subsequent amendments thereto shall be subject to the prior written approval of the bank examiner.

(b) Upon the establishment of the guaranty corporation, no industrial loan company licensed under and regulated by chapter 408, shall issue thrift account obligations, unless it is a member of the guaranty corporation.

§408A-6 Board of directors; powers. (a) the board of directors of the guaranty corporation shall consist of seven members and shall have responsibility and control over the organization, management, policies and activities of the guaranty corporation. Four votes shall be required for any action taken by the board. The board may, subject to the prior written approval of the bank examiner:

(1) Investigate and inquire into the financial condition and management of any of its members, and have access to examine at reasonable hours, the offices, books, accounts, papers, records, files, safes and vaults thereof.

(2) Impose such reasonable restrictions and conditions on the activities and operations of its members as it finds necessary to protect the interests of the members' thrift account holders or to prevent thrift account holder loss.

(3) Make recommendations to the bank examiner as to actions reasonably necessary to protect the interests of members' thrift account holders.

(4) Invest amounts held in the guaranty fund in accordance with the requirements set forth in section 408-14 with respect to the investment of the cash or security reserve.

(5) Borrow funds from the State or any other lender when necessary to effectuate the provisions of this chapter.

§408A-7 Guaranty corporation, power to act as receiver. (a) Whenever the bank examiner makes application pursuant to section 401-12 or 402-5 for the appointment of a receiver of any member, he may request that he court appoint the guaranty corporation as receiver.

(b) In the event that the guaranty corporation is appointed receiver it shall have all of the powers of receivers as set forth in chapters 401 and 402.

§408A-8 Miscellaneous powers of guaranty corporation. (a) In order to reopen a closed member or, when the guaranty corporation has determined that a member is in danger of closing, in order to prevent such closing, the guaranty corporation, with the approval of the bank examiner, is authorized to make loans to, or purchase the assets of, or invest in, such member, upon such terms and conditions as the board with the approval of the bank examiner may prescribe.

(b) Receivers or liquidators of members shall be entitled to offer the assets of such members for sale to the guaranty corporation or as security for loans from the guaranty corporation. The proceeds of every such sale or loan shall be utilized for the same purposes and in the same manner as other funds realized from the liquidation of the assets of such members. The guaranty corporation with the approval of the bank examiner may make loans on the security of or may purchase and liquidate or sell any part of the assets of a member which may hereafter be placed in receivership or adjudicated bankrupt, but in any case in which the guaranty corporation is acting as receiver of a member, no such loan or purchase shall be made without the approval of a court of competent jurisdiction.

* * *

§408A-9 Guarantee of thrift accounts. Thrift accounts plus unpaid interest thereon accrued as of the last interest accrual date prior to the date of receivership of the property and business of a member or the date such member is declared bankrupt, whichever first occurs shall be guaranteed by the guaranty corporation as follows:

(1) For single ownership thrift accounts in any one institution:

(A) Funds owned by an individual and invested in the manner set forth in this paragraph [(1)] shall be

added together and guaranteed up to $10,000 in the aggregate.

(B) Individual accounts invested in one or more accounts in his own name shall be guaranteed up to $10,000 in the aggregate.

(C) Funds owned by a principal and invested in one or more accounts in the name or names of agents or nominees shall be added to any individual account of the principal and guaranteed up to $10,000 in the aggregate.

(D) Accounts held by a guardian, custodian, or conservator for the benefit of his ward or for the benefit of a minor under the "Hawaii Uniform Gifts to Minors Act" and invested in one or more accounts in the name of the guardian, custodian, or conservator shall be added to any individual account of the ward or minor and guaranteed up to $10,000 in the aggregate.

(2) For testamentary accounts in any one institution:

(A) Funds owned by an individual and invested in a revocable trust account, or tentative trust account, payable-on-death account, or similar account evidencing an intention that on his death the funds shall belong to his spouse, child, or grandchild shall be guaranteed up to $10,000 in the aggregate as to each such named beneficiary, separately from any other account of the owner.

(B) If the named beneficiary of such an account is other than the owner's spouse, child, or grandchild, the funds in such account shall be added to any individual account of such owner and guaranteed up to $10,000 in the aggregate.

(3) For accounts in any one institution held by [personal representatives], being funds of a decedent held in

the name of the decedent or in the name of the [personal representative] of his estate and invested in one or more accounts shall be guaranteed up to $10,000 in the aggregate, separately from the individual accounts of the beneficiaries of the estate or of the [personal representative].

(4) For corporation or partnership accounts in any one institution, being accounts of a corporation or partnership engaged in any independent activity, up to $10,000 in the aggregate. An account of a corporation or partnership not engaged in an independent activity shall be deemed to be owned by the person owning such corporation or comprising such partnership and, for guarantee purposes, the interest of each person in such account shall be added to any other account individually owned by such person and guaranteed up to $10,000 in the aggregate.

(5) for unincorporated association accounts in any one institution, being accounts of an unincorporated association engaged in any independent activity up to $10,000 in the aggregate. An account of an unincorporated association not engaged in any independent activity shall be deemed to be owned by the persons comprising such association and, for guarantee purposes, the interest of each owner in such account shall be added to any other account individually owned by such person and guaranteed up to $10,000 in the aggregate.

(6) For joint accounts in any one institution:

(A) Accounts owned jointly, whether as joint tenants with right of survivorship, as tenants by the entirety, or as tenants in common, shall be guaranteed separately from account individually owned by the co-owners.

(B) A joint account shall be deemed to exist, for purposes of guarantee of accounts, only if each co-

owner has personally executed an account signature card and possesses redemption rights.

(C) An account owned jointly which does not qualify as a joint account for purposes of guarantee of accounts shall be treated as owned by the named persons as individuals, and the actual ownership interest of each such person in such account shall be added to any other account individually owned by such person and guaranteed up to $10,000 in the aggregate.

(D) All joint accounts owned by the same combination of individuals shall first be added together and guaranteed up to $10,000 in the aggregate.

(E) The interest of each co-owner in all joint accounts owned by different combinations of individuals shall then be added together and guaranteed up to $10,000 in their aggregate.

(7) For trust accounts in any one institution being all trust interests for the same beneficiary invested in accounts established pursuant to valid trust arrangements created by the same settler (grantor) shall be added together and guaranteed up to $10,000 in the aggregate, separately from other accounts of the trustee of such trust funds or the settlor or beneficiary of such trust arrangements.

§408A-10 Guarantee fund: establishment, maintenance, assessment. The guaranty corporation shall establish and maintain a guaranty fund as follows:

(1) The guaranty corporation shall within ten days after the issuance of its charter levy on each of its members an initial assessment equal to one-quarter of one per cent of each member's outstanding thrift account obligations as shown on the most recent reports required by section 408-21. One year after the initial assessment, the guaranty corporation shall levy

on each of its members an assessment of three-eights of one per cent of each member's outstanding thrift account obligations. Two years after the initial assessment the guaranty corporation shall levy an assessment of one-half of one per cent of each member's outstanding thrift account obligations and a similar assessment shall be levied annually thereafter until the fund equals or exceeds two per cent of the total thrift account obligations of all members of the guaranty corporation. In the event that upon receivership of any member the amount of total funds available in the guaranty fund are insufficient to pay $10,000 of each thrift account obligation as specified in section 408A-9, the bank examiner may make demand upon the guaranty corporation for an advance payment, as may be required to meet the deficiency, of annual assessments to become due, not to exceed two times the annual assessment. Any amount prepaid by a member as a result of such demand by the bank examiner shall be credited to the next annual assessment or assessments and each member shall at the time of the next annual assessment pay the balance otherwise due, if any, or shall be refunded any amount overpaid as a result of the advance assessment. At no time shall any member be required to be prepaid in excess of three years.

(2) Whenever the total amount in the fund exceeds two per cent of the total of all members' thrift account obligations as shown on the most recent reports required by section 408-21, the guaranty corporation shall not levy the annual assessment; provided that any member, which at such time has not paid assessments totaling at least two per cent of its outstanding thrift account obligations, shall continue to pay assessments in accordance with the schedule established by paragraph (1) of this section until it has

paid two per cent of its outstanding thrift account obligations.

(3) The guaranty corporation may assess members at any time during any calendar year in which the fund has been reduced by a demand of the bank examiner if the aggregate assessments during the year do not exceed the amount provided in paragraph (1) above.

Note. For general obligation bond authorization to provide loans to guaranty corporation, see L 1977, c 2, §4.

§408A-11 Notice of assessment; payment. the guaranty corporation shall send a written notice of assessment to each member assessed within five days after the levy of any assessment. Amounts assessed shall be paid to the guaranty corporation by each member assessed not later than sixty days following written notice of assessment.

* * *

§408A-14 Payments for members in receivership. (a) When a member has been adjudicated bankrupt or has been or is in receivership, the bank examiner shall either:

(1) Direct the guaranty corporation to forthwith pay to each thrift account holder of the member up to $10,000 as specified in section 408A-9; or

(2) withhold any direction to the guaranty corporation until it has been determined that the proceeds of the receivership are insufficient to pay up to $10,000 of each thrift account obligation as specified in section 408A-9; upon such determination the bank examiner shall direct the guaranty corporation to pay each such deficiency.

(b) The guaranty corporation shall comply with any demand for payment made by the bank examiner pursuant to section 408A-14(a) within ninety days from the date of the demand. If the total funds available from the guaranty

corporation at the time demand for payment is made are insufficient to pay in full the amounts provided by section 408A-9, the amount paid to each thrift account holder shall be ratably reduced in proportion to the amount by which the fund is deficient, and thereafter further payments shall be made ratably to each thrift account holder in accordance with the directions of the bank examiner as additional funds are paid into the guaranty fund. When thrift account obligations are paid, each member's account shall be reduced ratably based on its account balance prior to the payment.

(c) Whenever the guaranty corporation makes payments in accordance with section 408A-14(a), it shall be subrogated to all rights of the thrift account holder up to the amount of its payment, and shall be entitled to repayment in full from the estate of the member prior to any distribution to the thrift account holder to whom it has made payment.

§408A-15 Bank examiner's authority to take possession of guaranty corporation, grounds. Whenever it appears to the bank examiner that the guaranty corporation has violated its articles of incorporation or any law of this State, has not paid amounts as directed by the bank examiner pursuant to section 408A-14, has invested its funds in violation of section 408A-6, has not levied assessments as required by sections 408A-10 and 408A-11, has not taken action to enforce payment as required by section 408A-13, has violated any section of this chapter, or has neglected or refused to submit its books, papers, and affairs for the inspection of the bank examiner, the bank examiner may order the guaranty corporation to cease and desist from committing any such violations and, failing compliance with such order, may forthwith take possession of the property and business of the guaranty corporation and retain possession until the guaranty corporation satisfies the bank examiner that it will operate in conformity with this chapter. During the time the bank examiner has such

possession, he shall perform the duties and carry out the obligations of the guaranty corporation.

§408A-16 Action to enjoin taking: hearing, order. Whenever the bank examiner has taken possession of the property and business of the guaranty corporation, the guaranty corporation, if it deems itself aggrieved thereby, may apply to the circuit court of the first circuit to enjoin further proceedings. The court, after citing the bank examiner to show cause why further proceedings should not be enjoined, and after a hearing and a determination of the facts upon the merits, may dismiss such application, enjoin the bank examiner from further proceedings and direct him to surrender the property and business to the guaranty corporation, or make such further order as may be just.

* * *

In 1983, the Hawaii Legislature amended HILCGA such that, *inter alia,* Hawaii Rev. Stat. § 408A-4 (Supp. 1983), provided:

> §408A-4 Establishment of guaranty corporation. (a) Within sixty days after [April 1, 1977,] all industrial loan companies operating on [April 1, 1977,] which have issued and have outstanding thrift account obligations shall establish a nonprofit corporation pursuant to chapter 416, to operate under the name "THRIFT GUARANTY CORPORATION OF HAWAII". Initial administrative and organizational expenses shall be borne equally by the organizing companies. The initial bylaws and any subsequent amendments thereto shall be subject to the prior written approval of the bank examiner.
>
> (b) No industrial loan company licensed under and regulated by chapter 408, shall issue thrift account obligations, unless it is a member of the

guaranty corporation. All such thrift account obligations shall be insured either by the guaranty corporation or by the Federal Deposit Insurance Corporation; provided that after June 30, 1984, no industrial loan company shall issue thrift account obligations, unless such obligations are insured by the Federal Deposit Insurance Corporation.